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1 [The R.M.C. 806 session was called to order at 0935,
2 16 December 2016.]

3 MJ [Col SPATH]: This military commission is called to order.
4 This session has been closed in accordance with 10 U.S.C. 949d(C) and
5 Rule for Military Commission R.M.C. 806(b)(2).

6 The commission gave notice to the public and the parties of
7 its decision to conduct this closed session in Appellate
8 Exhibits 359G and 092X. The accused is not present.

9 Trial Counsel, please account for the members of the team
10 who are present currently.

11 TC [MR. MILLER]: Good morning, Your Honor.

12 MJ [Col SPATH]: Good morning.

13 TC [MR. MILLER]: Your Honor, present today for the prosecution
14 is myself, Mark Miller; Lieutenant Paul Morris; Lieutenant Jonathan
15 Cantil; Lieutenant Cherie Jolly; Master Sergeant [REDACTED] Mr.
16 [REDACTED] Manning the doors are Petty Officer 1st Class
17 [REDACTED] and Staff [REDACTED] Brigadier General Martins
18 was called out but he will be returning at some point shortly.

19 All persons including, obviously, Brigadier General
20 Martins, have the necessary clearances, Your Honor. Thank you.

21 MJ [Col SPATH]: Thank you. Defense Counsel?

22 LDC [MR. KAMMEN]: Good morning, Your Honor. Present for the

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1 defense are myself, Richard Kammen; Attorneys Rosa Eliades;
2 Lieutenant Commander Jennifer Pollio; and Mary Spears; paralegal
3 Sergeant [REDACTED] Linguist [REDACTED] Ms. Brandi Janes,
4 paralegal; DSO, Mr. [REDACTED] and Brigadier General John Baker.

5 Everyone has the necessary clearances.

6 MJ [Col SPATH]: All right. Thank you. Is Colonel Gabavics
7 here and ready to go, Trial Counsel?

8 TC [MR. MILLER]: At last time we checked he was not. I was
9 going to ask ----

10 MJ [Col SPATH]: Remember the microphone.

11 TC [MR. MILLER]: Oh, I'm sorry, Your Honor.

12 MJ [Col SPATH]: That's all right.

13 TC [MR. MILLER]: Last time we checked, he was not, so I am
14 going to ask Petty Officer [REDACTED] to check again.

15 MJ [Col SPATH]: All right. General Martins has returned.

16 CP [BG MARTINS]: Thank you, Your Honor.

17 TC [MR. MILLER]: He is still not here.

18 MJ [Col SPATH]: Still waiting on Colonel Gabavics. Okay.
19 Hopefully he'll be here soon.

20 TC [MR. MILLER]: Hopefully. Thank you, Your Honor.

21 MJ [Col SPATH]: So separate from Colonel Gabavics, the
22 outstanding issue is 092. We had a couple orders of business.

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1 Defense, I think you wanted me to see the proposed
2 substitute. Is that ----

3 LDC [MR. KAMMEN]: I did, but you can't ----

4 MJ [Col SPATH]: Okay.

5 LDC [MR. KAMMEN]: ---- because it can't be shown in the
6 courtroom. That, of course, bears, we think, on the inadequacy of
7 the substitution, that it can't be shown in the courtroom.

8 We can make arrangements, if everyone wants to go to [REDACTED]
9 for you to see it, but that would require everyone going into a
10 rather cramped facility. But we've been told that there's -- at
11 least for this session, there's no way to make it available to you.

12 MJ [Col SPATH]: All right. And it's in the record already, I
13 know, as one of the appellate exhibits.

14 LDC [MR. KAMMEN]: Well, that may be in the record, but part of
15 the issue, of course, is ----

16 MJ [Col SPATH]: That was in the ----

17 LDC [MR. KAMMEN]: It's not in the record in this case.

18 MJ [Col SPATH]: It's not in the record with both of you ----

19 LDC [MR. KAMMEN]: Right.

20 MJ [Col SPATH]: ---- and I have not seen it, as I mentioned.
21 So let's do this. Let's mark your proposed exhibit, which I
22 recognize is the -- whatever the government gave you.

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1 LDC [MR. KAMMEN]: We don't have that here because it's so
2 highly classified, we couldn't transport it.

3 MJ [Col SPATH]: No, I understand.

4 LDC [MR. KAMMEN]: Okay.

5 MJ [Col SPATH]: That way for me when I -- because I assure you
6 what I am going to do is go see it, either on a break or right when
7 we're done today.

8 And let me just check. Is that something I can go see here
9 on the island, do you know?

10 **[Conferred with courtroom personnel.]**

11 MJ [Col SPATH]: Okay. Apparently I can.

12 LDC [MR. KAMMEN]: You can or cannot?

13 MJ [Col SPATH]: Can, C-A-N. If there's any issues, I'll let
14 you know through a filing or somehow.

15 So let me just first check with the court reporters.
16 What's next in 092? Zulu.

17 All right. So General Martins, my plan is the defense
18 received in discovery I think a proposed substitute or ----

19 LDC [MR. KAMMEN]: That's what we've been told.

20 MJ [Col SPATH]: And I'm going to go look at that, but I want
21 to -- because your filing was an ex parte filing, I want to make this
22 an in camera filing, or in a closed session filing, one between us,

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1 which is your -- you want me to see what you were given, obviously.

2 LDC [MR. KAMMEN]: Right. I mean, we would prefer -- I
3 understand the mechanics, and we would prefer that it actually be
4 done at a setting when we were all together.

5 And here ----

6 MJ [Col SPATH]: I would, too, in some ways.

7 LDC [MR. KAMMEN]: Here's where I think we're at. You know,
8 they filed their motion to supplement. We have some idea of what's
9 coming. We haven't received the supplement yet. I believe that
10 motion to supplement is going to require an evidentiary hearing.

11 And so I think what we will have to do, among other things
12 between now and March, is we'll request witnesses; they'll deny the
13 witnesses; we'll request discovery; they'll deny the discovery. In
14 March we'll come here on the motion to compel.

15 MJ [Col SPATH]: And maybe it's something I can rule on ahead of
16 time.

17 LDC [MR. KAMMEN]: Perhaps. And ----

18 MJ [Col SPATH]: If we get there.

19 LDC [MR. KAMMEN]: But I do think there will have to be a rather
20 extensive evidentiary hearing, because essentially, as I understand
21 their position, this is no longer their responsibility. It's other
22 people's fault, you know ----

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1 MJ [Col SPATH]: So maybe the best option -- I'm not going to
2 mark it yet. I know what the next exhibit is. What we'll do,
3 hopefully in our next time together, have come up with the capability
4 to show it here, because at some point, presumably, if we get to
5 trial, assuming, of course, that your motions aren't granted -- if
6 they're granted, overcome by events -- if they're not granted and
7 we're sitting here trying to show the court members, we're going to
8 have to demonstrate a way to do it, so.

9 LDC [MR. KAMMEN]: Right.

10 MJ [Col SPATH]: Okay.

11 LDC [MR. KAMMEN]: And, again, we can have additional argument,
12 but I think really the most important thing is we would like the
13 commission to enter an order today ordering the prosecution and all
14 government agencies within the United States Government, or agencies
15 with which the United States Government has a relationship, foreign
16 agencies, to cease any work that may be being done on this site, to
17 preserve it as it is today.

18 Because in the event you rule that there was -- either the
19 substitution is inadequate or that there is additional investigation
20 that needs to be done, we need access to what remains.

21 And I think in fairness, especially given the fact now that
22 the prosecution is coming in with new facts that they've discovered,

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1 discovered five months after this issue arose, in fairness, there
2 should be an order preserving the status quo.

3 **[Knock on courtroom door.]**

4 MJ [Col SPATH]: I have a feeling our witness is here.

5 LDC [MR. KAMMEN]: I think so.

6 MJ [Col SPATH]: Thank you.

7 The witness is here? All right. Hold fire. We'll come
8 back to this ----

9 LDC [MR. KAMMEN]: Okay.

10 MJ [Col SPATH]: ---- and we'll talk some more. Let's get
11 Colonel Gabavics in here and finish his testimony. If you would,
12 just have Colonel Gabavics come in.

13 **[STEPHEN E. GABAVICS entered the courtroom.]**

14 MJ [Col SPATH]: Colonel Gabavics, just take your seat right
15 there. I know that you're the same Colonel Gabavics who testified --
16 I believe it was yesterday, under oath. Just remember you're still
17 under oath, okay?

18 WIT: Yes, sir.

19 MJ [Col SPATH]: All right. And Defense Counsel.

20 **COLONEL STEPHEN E. GABAVICS, U.S. Army, was recalled as a witness for**
21 **the defense, reminded he was still under oath, and testified as**
22 **follows:**

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1 within those. So basically it would have been like when we closed
2 our Camp [REDACTED] would have been about it.

3 Q. Okay. Now, have you reviewed any other documents?

4 A. No.

5 Q. Okay. And have you -- I assume at some point you've spoken
6 with the prosecution about your testimony?

7 A. Yes.

8 Q. On how many occasions?

9 A. Once about the testimony -- twice.

10 Q. Okay. And when did those conversations occur?

11 A. The first time I believe was last Friday.

12 Q. Okay.

13 A. And then the next time was on Wednesday afternoon.

14 Q. Okay. Now, to be -- as I reviewed what you told us
15 yesterday, my understanding is that this is the first time you've
16 ever been in charge of a long-term detention facility. Did I
17 understand that correctly?

18 A. That is correct.

19 Q. Okay. And you told us yesterday that you did not think it
20 was in Mr. al Nashiri's best interest that he remain here for, say,
21 the three or four nights of a weekly session. And why do you say
22 that? Why do you have that opinion?

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1 A. My opinion of that is based upon the living conditions that
2 are here versus what he has at Camp VII. The facilities here are
3 smaller than what he has; he has no open-air access like he has at
4 Camp VII with his recreation yard; inability to do anything communal
5 with the remainder of the detainees, communal prayer, communal meals,
6 anything of that nature; do not have the medical facilities here that
7 we have out at the camp; don't have the library, the other facilities
8 that he has.

9 So basically he would be here with virtually nothing during
10 a period of time ----

11 Q. Sure.


12 A. ---- for his well-being.

13 Q. Okay. Anything else pertaining to Mr. al Nashiri, other
14 than what you just told us?

15 A. No.

16 Q. Okay. And you also indicated you didn't believe it was in
17 the facility's best interest. Can you tell us why you believe that?

18 A. Multiple reasons.



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1 Q. Okay.

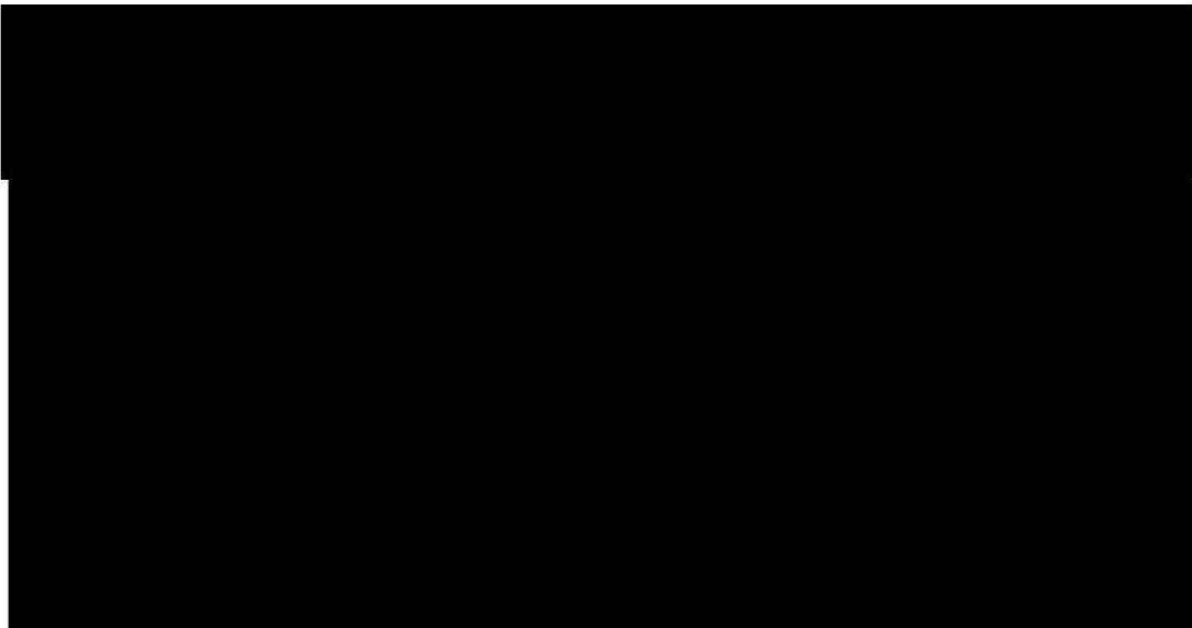
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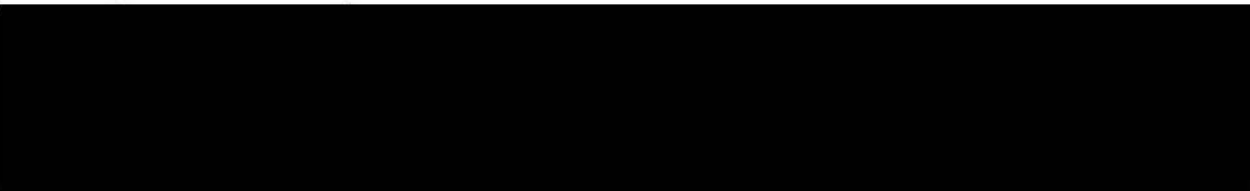


11 Q. Could you say that -- it would help everyone if you could
12 talk a little slower.

13 A. I'm sorry.

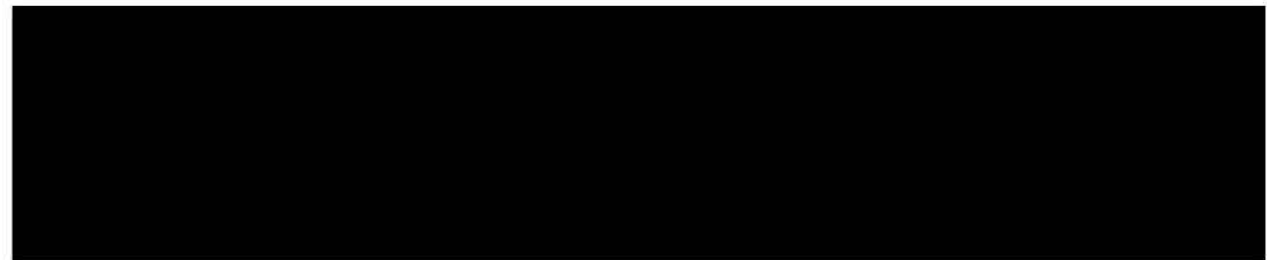
14 Q. What was your last sentence?

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18 Q. Okay. All right.

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1 A. I think that pretty much sums it up.

2 Q. Okay. All right. Now, we were -- have you ever spoken
3 with Mr. al Nashiri?

4 A. Very briefly.

5 Q. Okay. And when was that?

6 A. That was about three weeks ago.

7 Q. Why?

8 A. It was purely meeting with a couple of the leaders within
9 the blocks to get an idea of what they thought are issues within the
10 camp.

11 Q. Okay. And before that meeting -- I think I asked you in
12 open session, and the prosecution objected. When you came here, did

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15 A. I have heard different things. I've never been informed
16 formally on the things, nor have I researched the historical aspects
17 of it, as my responsibility is not to look at their historical past.
18 It's about responsibility of caring and treating for them now.

19 Q. Okay. So let me make sure I understand what you just said.
20 Has somebody specifically advised you, when you assumed this command,
21 that you were not to look at their historical past?

22 A. No.

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1 Q. Okay. That was a decision you made?

2 A. That's a decision that I made.

3 Q. Okay. And as a prison administrator, do you know whether
4 or not sort of declining to look at an inmate's historical past is in
5 accord with the accepted standards of prison administration?

6 A. Well, first off, it's not a prison here, once again. It is
7 a law of war detention facility. So I do like to make that
8 difference because it is significantly different, the way we ----

9 Q. All right. Can we use ----

10 TC [MR. MILLER]: Your Honor, can he finish his answer?

11 LDC [MR. KAMMEN]: Okay. Go ahead. Keep rambling.

12 MJ [Col SPATH]: Go a little slower though.

13 WIT: Okay.

14 MJ [Col SPATH]: You speak fast. That's okay, but they, over to
15 my right ----

16 WIT: They can't type fast enough.

17 MJ [Col SPATH]: They are taking down every word.

18 Q. And you wanted to go on about how in your mind this is a
19 law of war detention facility. Go ahead.

20 A. Well, there's differences in the way that we do things
21 here, obviously, by the fact that it is law of war detention,
22 following things under Article III, Geneva Convention, versus any

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1 prison. Such things as solitary confinement, things of that nature,
2 we don't do. So those things come into play.

3 Q. All right.

4 A. The aspect of do I think that there is any violation of
5 that? No, because my responsibility is to ensure that I have the
6 guard force, the staff to provide the proper care, custody and
7 treatment of the detainees. I have my medical personnel which are
8 there, responsible, looking at the medical components of all the
9 detainees, as well as the psychiatric care of the detainees.

10 I am advised only in the cursory aspects of things that
11 require me to make a decision or something in support of their
12 medical care or psychiatric care that would involve something else,
13 for a move or something of that nature. Otherwise, I'm not trying to
14 get involved with that piece. I'm not the expert in medical or
15 psychiatric, so I don't try to insinuate that I am or get into that.

16 Q. Well, and that raises an interesting question. But my
17 question, sir, is this: You're aware that many of the people in
18 Camp VII have been here already close to ten years without standing
19 trial. Are you aware of that?

20 A. I'm aware of when, for the most part, people came here to
21 the camp, yes.

22 Q. Okay. And so using Mr. al Nashiri as an example, you're

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1 aware that he has been in Guantanamo for ten years and, of course,
2 his trial is years away from commencing. Are you generally aware of
3 that?

4 A. Generally. I'm not sure of the date he arrived, but ----

5 Q. Sure. Well, if I suggested to you that it was in September
6 of 2006, would you have any reason to doubt that?

7 A. I would not have any reason to doubt that.

8 Q. Now -- and while I understand you want to call it a law of
9 war detention facility, could we also agree that in his context it is
10 a long-term pretrial detention facility?

11 A. In his context?

12 Q. Yeah.

13 A. I'm not going to speculate on his context. He can ----

14 Q. Well, you know he's charged with capital murder, don't you?

15 A. I know what he is charged with, yes.

16 Q. Okay. And you know he's awaiting trial, right?

17 A. Yes. He's held ----

18 Q. And you know he's been awaiting trial since 2011.

19 A. And I also know he's also held under the law of war
20 detention as the basis for that.

21 Q. Okay. And so in your mind that's not long-term pretrial
22 detention?

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1 TC [MR. MILLER]: Your Honor, I'm going to object to relevance.
2 Really, we're supposed to hear about standard protocols and
3 procedures.

4 LDC [MR. KAMMEN]: Well, I understand, but part of it is --
5 involves Nashiri and whether his judgment is arbitrary and capricious
6 with respect to Nashiri.

7 MJ [Col SPATH]: Well, it does. But he's already said he
8 doesn't have any idea how your client feels about this. And it
9 doesn't matter, frankly, for him. It doesn't. Objection sustained.

10 LDC [MR. KAMMEN]: Okay.

11 Q. [REDACTED]

12 [REDACTED]

13 A. I'm familiar with the term, yes.

14 Q. [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 A. [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 Q. Okay.

22 [REDACTED]

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1 A. I am not.

2 Q. Okay. [REDACTED]

3 [REDACTED]

4 A. No, I'm not.

5 Q. Okay. Now, I think you told us yesterday, but I want to
6 confirm, you are not familiar with the references about -- concerning
7 Mr. al Nashiri in the SSCI torture report?

8 A. I am not.

9 Q. Okay. And I presume you have not read a book recently
10 published by Mr. James Mitchell called Enhanced Interrogation
11 Techniques that refers to, in part, Mr. al Nashiri's time in the CIA
12 black sites [REDACTED]?

13 A. I have not.

14 Q. Okay. Have you read any articles about Mr. al Nashiri's
15 time in the CIA black sites?

16 A. I have not.

17 Q. Now, you indicated yesterday that you were generally
18 familiar with the term "PTSD"?

19 A. I'm quite familiar with the term "PTSD."

20 Q. Okay. So you are familiar with some of the potential
21 causes of PTSD?

22 A. Yes, I am.

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1 Q. Okay. And are you familiar with the fact that torture,
2 being subjected to torture, can cause PTSD?

3 A. I am aware of that, yes.

4 Q. Okay. And are you familiar with some of the symptoms -- or
5 of the symptoms generally of PTSD?

6 A. I'm aware of a wide range of symptoms of PTSD.

7 Q. Sure. And among those wide range of symptoms, excuse me,
8 are avoidance behavior, right?

9 A. Yes.

10 Q. Flashbacks?

11 A. Yes.

12 Q. Somatic complaints, somatic issues?

13 A. Yes.

14 Q. Okay. What other symptoms are you aware of?

15 A. Aware of everything from -- ranging from depression; to
16 inability to sleep; to overall anxiety; to excessive sleep; to
17 physical aspects in terms of actual convulsions and stuff based upon
18 severity of different aspects of PTSD; multiple different types of
19 depression aspects of it; bipolar disorders. There's multiple things
20 that can occur from PTSD. Certainly depends upon individuals and the
21 events.

22 Q. Okay. And are you aware that in 2000 -- I believe in 2012

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1 three military doctors advised this commission that Mr. al Nashiri
2 suffers from complex PTSD and depression?

3 A. I am not.

4 Q. Okay. Are you familiar with the fact that Dr. -- are you
5 familiar with a woman by the name of Dr. Sondra Crosby?

6 A. I am not.

7 Q. Okay. And if I represent to you that she testified before
8 this commission, I believe in 2013 or 2014, that it's within ----

9 TC [MR. MILLER]: Judge, I'm going to object. If he doesn't
10 know, then to suggest, it's just a suggestion to him.

11 LDC [MR. KAMMEN]: Let me withdraw the question.

12 Q. Are you aware of any diagnosis she may have provided to
13 this commission?

14 A. I am not.

15 Q. Okay. Do you know -- and I'd be a little surprised if you
16 do -- what the proper course of treatment of PTSD is?

17 A. I mean, I know there's multiple courses, but I have not
18 prescribed it nor -- you know, so I could not definitively tell you.

19 Q. Well, would it be within your knowledge that part of the
20 proper course of treatment for PTSD would be for the treatment
21 provider to take a detailed trauma history of the individual?

22 A. Yes. I mean, I could assume that.

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1 Q. Okay. And do you know whether or not, since Mr. al Nashiri
2 came to Guantanamo Bay, whether that has ever been done?

3 A. I do not know.

4 Q. Are you familiar with the potential consequences to an
5 individual who suffers from complex PTSD when that PTSD is not
6 treated?

7 A. It can be a wide-ranging thing, everything from
8 self-recovery of different things, as well as psychological mood to,
9 to an extreme of, you know, suicide as well.

10 Q. Okay. So it can have a wide range ----

11 A. Very wide range.

12 Q. And so would you agree that these wide-ranging symptoms can
13 become worse ----

14 A. Certainly.

15 Q. ---- without treatment?

16 A. Can become worse or better.

17 Q. Now, are you familiar with the consequences of torture,
18 beyond PTSD?

19 A. I mean, I'm familiar that, depending upon what the event
20 was, it could cause physical aspects. But beyond that, no.

21 Q. Okay. All right. And as a -- somebody responsible for a
22 law of war detainee's well-being, would it be helpful or necessary

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1 for you to know if he was tortured prior to getting here and what
2 torture he was subjected to?

3 A. I do not believe so. I think the important thing is that I
4 know what his condition is now in terms of general terms and that I
5 have the medical care and psychiatric care responsible to be able to
6 help him if required.

7 Q. All right. So it would be important for you to know his
8 condition now, but you're unaware of any diagnoses that
9 Mr. al Nashiri has received. Is that your testimony?

10 A. Yes.

11 Q. Okay. And would it be important to you, as a supervisor
12 running a law of war detention facility, to put in place protections
13 against -- to help a person who suffers from PTSD?

14 A. Can you define what you mean by "protections"?

15 Q. Well, you're aware that certain things can trigger sequelae
16 of PTSD, such as flashbacks, hypervigilance, acting out, in response
17 to the triggers?

18 A. Yes.

19 Q. Okay. Would it be helpful to know if any of your -- the
20 way you're running your facility accidentally triggers a detainee's
21 PTSD?

22 A. Well, there would be no way to, first off, identify if

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1 anything has triggered it, unless there was -- something brought
2 about that indication. I've not been indicated anything that
3 somebody has triggered a flashback. I know my focus is based upon
4 the, literally the care and custody of the detainees and the
5 prompt ----

6 Q. Sure. But wouldn't it be helpful to know what a person was
7 subjected to before, so you could do your best to avoid things that
8 might trigger his behavior?

9 A. I know definitively we're not doing anything remotely
10 related to anything that would be an interrogation technique, or
11 anything else that would, in my mind, that would trigger ----

12 Q. Well, are you familiar with the cells in which
13 Mr. al Nashiri was kept while he was in black sites?

14 A. I am not.

15 Q. [REDACTED]
16 [REDACTED]

17 A. I'm only familiar with the cell that he's in now.

18 Q. All right. And do you have any idea whether it's the same
19 cell he's in now or something different?

20 A. I do not.

21 MJ [Col SPATH]: Mr. Kammen?

22 LDC [MR. KAMMEN]: Yes.

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1 MJ [Col SPATH]: The outside observers probably feel like I was
2 picking on the government this week. I don't think I was, but I
3 recognize, I recognize perception in the world.

4 LDC [MR. KAMMEN]: Nobody thinks you were picking on the
5 government this week.

6 MJ [Col SPATH]: Oh, I doubt that highly. Here's my question.
7 This has to do with standard of care stuff again, and we've litigated
8 standard of care, some rulings issued before I got on board and some
9 after.

10 This is not helpful to the one issue at hand, whether he
11 should be housed here or back there during ----

12 LDC [MR. KAMMEN]: Well ----

13 MJ [Col SPATH]: That's all ----

14 LDC [MR. KAMMEN]: I understand.

15 MJ [Col SPATH]: Okay. That's all I want to hear about for the
16 purpose of this testimony.

17 LDC [MR. KAMMEN]: Well ----

18 MJ [Col SPATH]: That's why I allowed the witness to come.

19 LDC [MR. KAMMEN]: Sure.

20 MJ [Col SPATH]: I gave you the witness. But that's what it's
21 got to be focused on. I'm not saying there aren't opportunities to
22 ask him the questions for other purposes and other motions that might

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1 be filed.

2 What I'm talking about though -- you've already indicated
3 through a proffer the cell here is less friendly, less kind, smaller,
4 doesn't have the facilities, doesn't have the creature comforts, and
5 your client's happy to take that on. And I appreciate that. And I
6 assume we'll hear that from your client's testimony.

7 I need to understand why he's transported here and why he's
8 transported back and why that's in the best interest of the
9 confinement facility or detainee facility or law of war facility.

10 LDC [MR. KAMMEN]: Well, I appreciate, but there's two pieces to
11 this. Obviously we'd like to persuade you to grant the motion.

12 MJ [Col SPATH]: I understand.

13 LDC [MR. KAMMEN]: But if we fail in that, we'd like to preserve
14 a record for appellate review.

15 MJ [Col SPATH]: But this is not the vehicle to preserve that
16 record. This is not the vehicle. This motion is focused on housing
17 at the ELC. That's what this 806 session was granted for, and that's
18 all I want to hear about.

19 LDC [MR. KAMMEN]: Well, with respect, if his judgment is not
20 based upon any knowledge of the inmate, and is simply based on a
21 blanket position with respect to an individual inmate in an
22 individual situation, the judgment may be arbitrary and capricious.

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1 And so his knowledge about the inmate and his knowledge
2 about the inmate's situation is important to bear upon the
3 arbitrariness of his position.

4 MJ [Col SPATH]: Maybe, marginally, except that he's already
5 given his explanation as to why housing the inmate here isn't
6 feasible for him. It has nothing to do with Mr. al Nashiri's past or
7 anything like that. [REDACTED]

8 [REDACTED] And that's his
9 testimony.

10 LDC [MR. KAMMEN]: And so are we allowed to challenge that, or
11 do we ----

12 MJ [Col SPATH]: You can challenge that, of course. But ----

13 LDC [MR. KAMMEN]: And wouldn't some knowledge of who the
14 individual inmate is and what his circumstances are bear upon that?

15 MJ [Col SPATH]: I don't believe so. Not for this issue.

16 LDC [MR. KAMMEN]: Okay.

17 MJ [Col SPATH]: And, frankly, he's already indicated he really
18 has no knowledge of Mr. al Nashiri.

19 LDC [MR. KAMMEN]: Well, and I think that goes to the
20 arbitrariness of his decision.

21 MJ [Col SPATH]: And so that's -- you have that in argument, but
22 it's already been established. He's made clear he didn't review his

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1 past, he doesn't know his past, and he's met him once.

2 LDC [MR. KAMMEN]: All right.

3 MJ [Col SPATH]: And then I just -- I have the 505 notice as
4 well about the areas we were going to talk about.

5 I'm just trying to keep this one focused -- again, I'm not
6 saying that that may not become relevant. You still have ----

7 LDC [MR. KAMMEN]: Yeah, I know. Another time when we're
8 looking for Mr. In Due Course. I understand.

9 MJ [Col SPATH]: Not in due course. That, frankly, is as
10 dismissive as I found General Martins to be.

11 LDC [MR. KAMMEN]: I apologize. I apologize.

12 MJ [Col SPATH]: I'm dealing with the motion at hand and the 505
13 notice that was handed to me. I've indicated to you that I think
14 your mitigation case is going to be quite wide reaching. It's a
15 capital case. Your mitigation case will be wide reaching.

16 This may well be relevant mitigation evidence down the
17 road. It is not relevant to what we're dealing with right now.

18 LDC [MR. KAMMEN]: Fine. Well, with -- my next topic would be,
19 because he talked about there's lack of showers here. I'd like to
20 ask him whether he's familiar with Mr. al Nashiri's unwillingness to
21 take showers ----

22 MJ [Col SPATH]: You may.

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1 LDC [MR. KAMMEN]: Thank you.

2 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

3 Q. Are you familiar with any of the things in any of the
4 records dealing with Mr. al Nashiri's behavior in the showers?

5 A. Not in any detail, no, I'm not.

6 Q. Okay. Are you familiar with the fact that he doesn't like
7 to take showers and only likes to be dripped because showers remind
8 him of when he was waterboarded by the United States?

9 A. I'm not aware of that part. I know that he does not like
10 to take showers.

11 Q. Okay.

12 A. That's about the extent of it.

13 Q. All right.

14 A. Like I said, I get the advice from my medical personnel.
15 And I also will say it's not arbitrary in terms of what I do make my
16 decision. I know the basis of what his -- the thing is I also --
17 that my medical doctor has told me that two weeks ago when he talked
18 to al Nashiri he said he wanted to stay back at Camp VII as well,
19 based upon the same things that I have testified.

20 Q. All right. Now, with the court's permission, I assume you
21 have never dealt with somebody who is standing trial in a capital
22 case?

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1 A. Not directly, no.

2 Q. Okay. You're not familiar with the stresses that they
3 might be under?

4 A. Not directly, no.

5 Q. Okay. And I assume you're only noddingly familiar with the
6 stresses of standing trial in a foreign country where you don't speak
7 the language?

8 A. I mean, yes. I mean ----

9 Q. Generally?

10 A. Generally.

11 Q. Okay. Or in a foreign -- standing trial in a foreign
12 country where that country has previously abused you?

13 A. Once again, I'd be making an assumption or assertion on
14 that one and ----

15 Q. Now, let's turn to the facilities here at this location,
16 the ELC. Behind the ELC there are, as I recall, [REDACTED]
17 cells; is that correct?

18 A. Yes.

19 Q. Each of those cells are really identical, true?

20 A. Yes.

21 [REDACTED]
22 [REDACTED]

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1 A. That is my understanding, yes.

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12 Q. You've never seen the cells behind the ELC?

13 A. I've not walked through them independently, no.

14 Q. Okay. And you've never walked into them?

15 A. I have not.

16 Q. Each of the cells has a bed, correct?

17 A. I'm aware of that, yes.

18 Q. Each of the cells has a commode and running water, true?

19 A. Yes.

20 Q.

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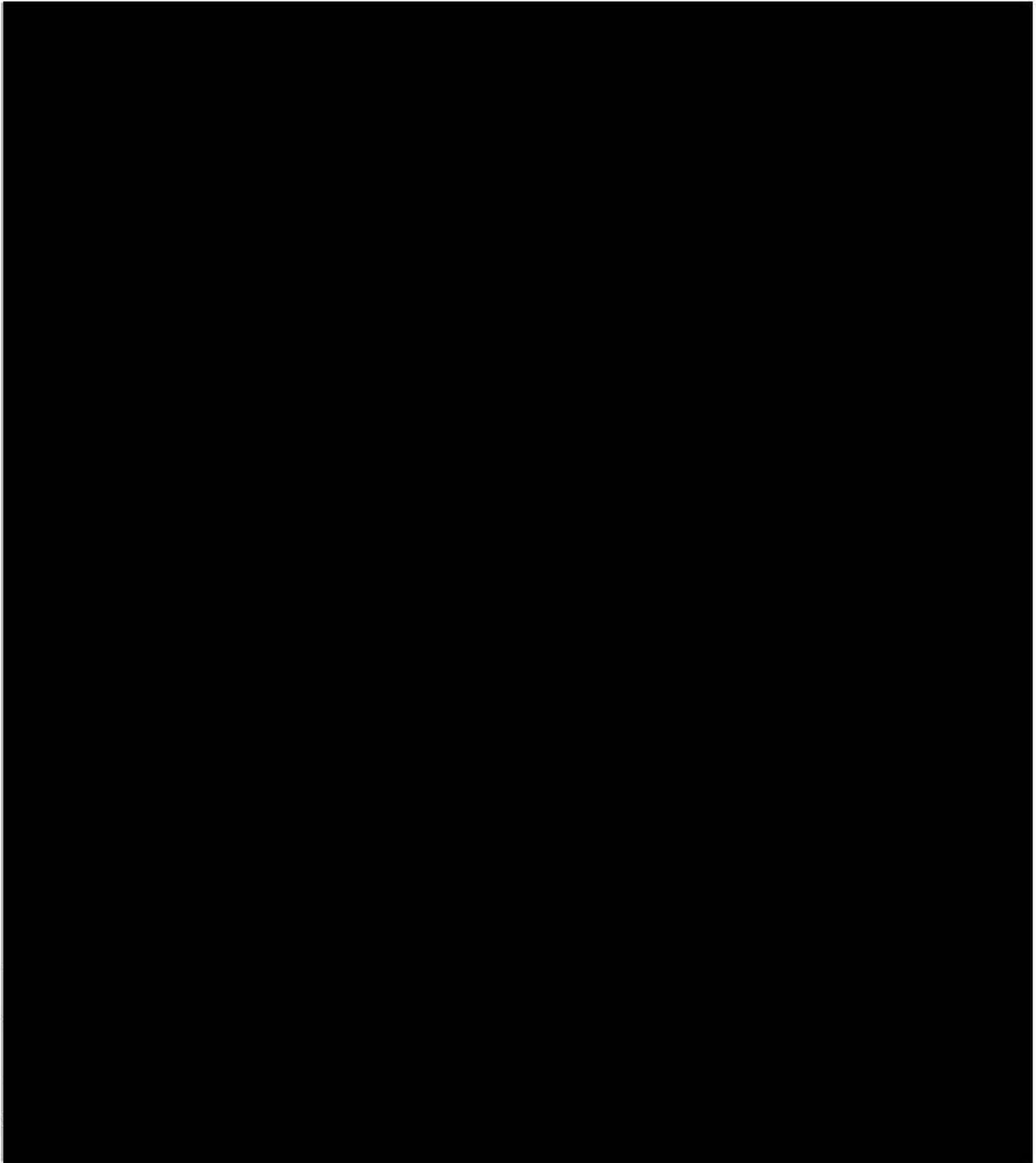
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1 Q. Okay. Now ----

2 A. I'll say I'm not concerned about him escaping here either.

3 Q. Okay. So escape is not an issue?

4 A. That's not what I am concerned about.

5 Q. Okay. I think you said that living conditions -- we're

6 talking about living conditions, open air, community, medical

7 facilities, library were, in your mind, the issue?

8 A. That's part of the issue, yes.

9 Q. Okay. Well, we'll come to the other. All right.

10 If the inmate -- the inmate is not required to go to the

11 doctor in Camp VII, is he?

12 A. They're not required, no.

13 Q. Okay. The inmate is not required to go to the library, is

14 he?

15 A. They're not required, no.

16 Q. The inmate's not required to participate in community

17 activities or communal prayer, are they?

18 A. Nope, not required to.

19 Q. The inmate is not required to avail themselves of the

20 open-air recreation, true?

21 A. Well, they can close their door, if they don't, but yes.

22 Q. Okay. Those are individual choices an inmate can make

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1 while at Camp VII, correct?

2 A. Yes.

3 Q. Now, if an inmate is at court during the day and physically
4 sitting in court, obviously he's not going to the doctor, true?

5 A. Unless he needed care, yes.

6 Q. Okay. He's not going to the library, right?

7 A. Right.

8 Q. Not doing communal prayer, not doing any of those other
9 things while he is at court, true?

10 A. Correct.

11 Q. I don't know, but in the absence of emergencies -- and I
12 understand that there's medical care for emergencies, but in the
13 absence of emergencies, is the doctor at Camp VII after [REDACTED]

14 A. There is at minimum a corpsman and a nurse, so.

15 Q. All right. But is a doctor at Camp VII after [REDACTED]

16 A. Depending upon the situation, generally no.

17 Q. Okay.

18 A. They're always on call.

19 Q. Okay. Is there a point in the evening when the library
20 closes at Camp VII?

21 A. The delivery -- well, delivery of materials are usually
22 done during periods of time, and they are able to keep the materials

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1 throughout the duration, until they collect the next time.

2 Q. All right. So they don't go to the library; the books are
3 brought to them?

4 A. Yes.

5 Q. Okay. And I assume -- and I don't mean to be sarcastic --
6 that the books are easily transportable and a book could be brought
7 here?

8 A. Well, they're given a wide selection that they can choose
9 from, along with everything else, so an entire cart of things are
10 taken out there.

11 Q. Sure. Okay. But, you know, do you want Tom Sawyer? The
12 guy says yes. You can bring Tom Sawyer here, right?

13 A. If it was that simple, yes.

14 Q. Okay. Now, the community prayers only happen at prayer
15 time, true?

16 A. Well, they also do it during different times of rec when
17 they go out, because they all go out to an open rec, established, and
18 they can go out there and do that as well.

19 Q. All right. When they go out to the open rec, that rec
20 time, what time does that end?

21 A. It depends upon the duration of time when they're going
22 out. There's different iterations for rec that they go to.

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1 Q. Well, okay. But ----

2 A. Generally speaking, it's about [REDACTED] from the time that
3 they go.

4 Q. Okay. But let me try and make my question more specific.
5 If an inmate says [REDACTED] I want to go to open rec, to
6 outdoor rec, is he allowed to do that?

7 A. No. It would be during designated times.

8 Q. And what are Mr. al Nashiri's designated times for rec?

9 A. I would have to go and look.

10 Q. Okay. [REDACTED]

11 A. Not at this time, no.

12 Q. Okay. All right. Now, you're the head of all of JTF; is
13 that correct?

14 A. No.

15 Q. Okay. You ----

16 A. I'm the commander of the Joint Detention Group.

17 Q. Okay. And the Joint Detention Group runs all of the law of
18 war detention facilities here at Guantanamo, correct?

19 A. Yes.

20 Q. And there are how many law of war detention facilities
21 still open?

22 A. [REDACTED]

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1 [REDACTED]

2 Q. Okay. And how many of those facilities house law of war --
3 well, strike that.

4 How many law of war detainees presently are at Guantanamo
5 Bay?

6 A. There's 59 right now.

7 Q. And 14 of them, I believe, are kept at Camp VII; is that
8 correct?

9 A. Correct.

10 Q. And where are the other 45 kept?

11 A. [REDACTED]

12 Q. All right. And what is your total troop component
13 available to you to manage these 59 law of war detainees?

14 A. Well, I have to break it down in a -- because it's not all
15 the same. I have the security requirements as well. That's another
16 component of it.

17 Q. Let's just work with me here. We'll get there.

18 A. All right.

19 Q. What's the total number?

20 A. [REDACTED]

21 Q. [REDACTED]

22 A. [REDACTED]

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1 Q. Okay. [REDACTED] how many of them are
2 young men -- or strike that.

3 How many of them are available to guard the 59 inmates?

4 A. [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 A. Yes, and they also support commissions here as well.

10 Q. I'm sorry?

11 A. They also support the commissions here.

12 Q. And so how many of the people here, on a day when we're in
13 session, [REDACTED] support Camp VII?

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

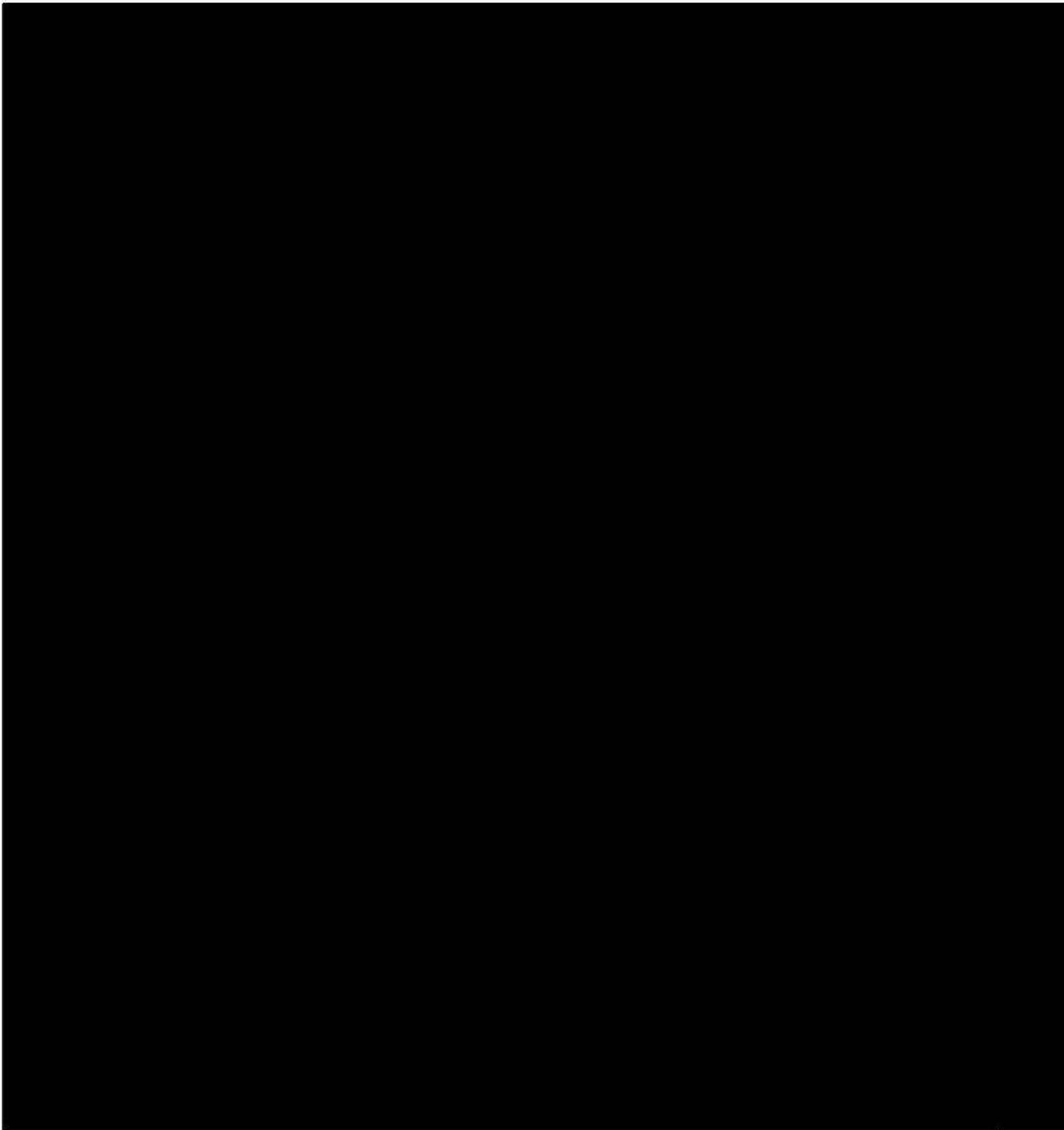
22 [REDACTED]

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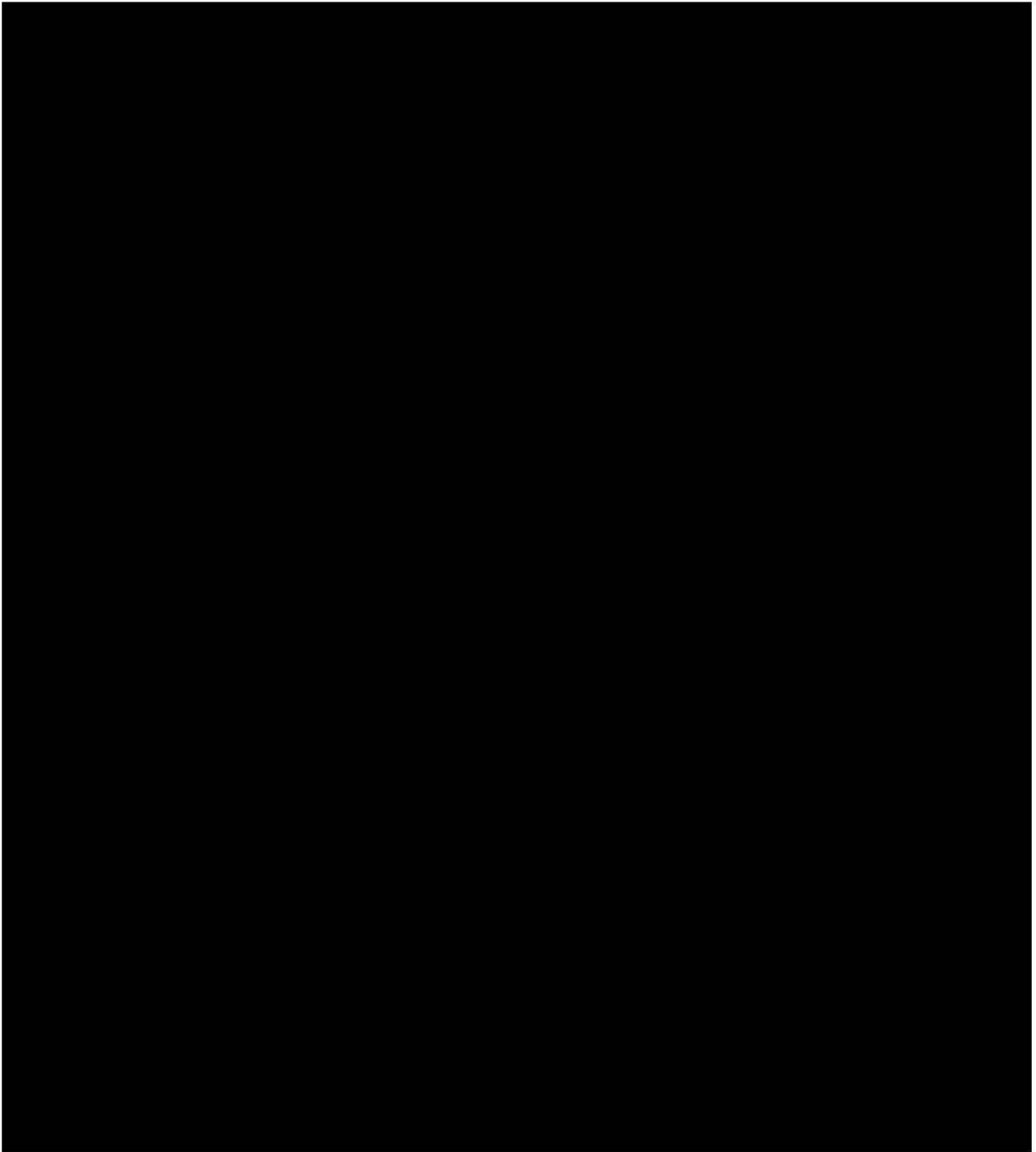
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2 A. The threat is also not just towards him. It's the external
3 threat as well for anything to this environment. We have the
4 responsibility to protect him just as we would for anything else.

5 Q. Okay. The external threat is the lawyers who are coming
6 here? I mean, what's the external threat?

7 A. The external threat could be anything.

8 Q. Okay.

9 A. I have a responsibility to ensure that we maintain the
10 absolute security for everything and the safety of our detainee and
11 our guard force.

12 Q. Absolutely.

13 A. We understand very clearly what potential and people think
14 about the detainees that we have here.

15 Q.

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1 Q. So the answer to my question is yes?

2 A. Yes.

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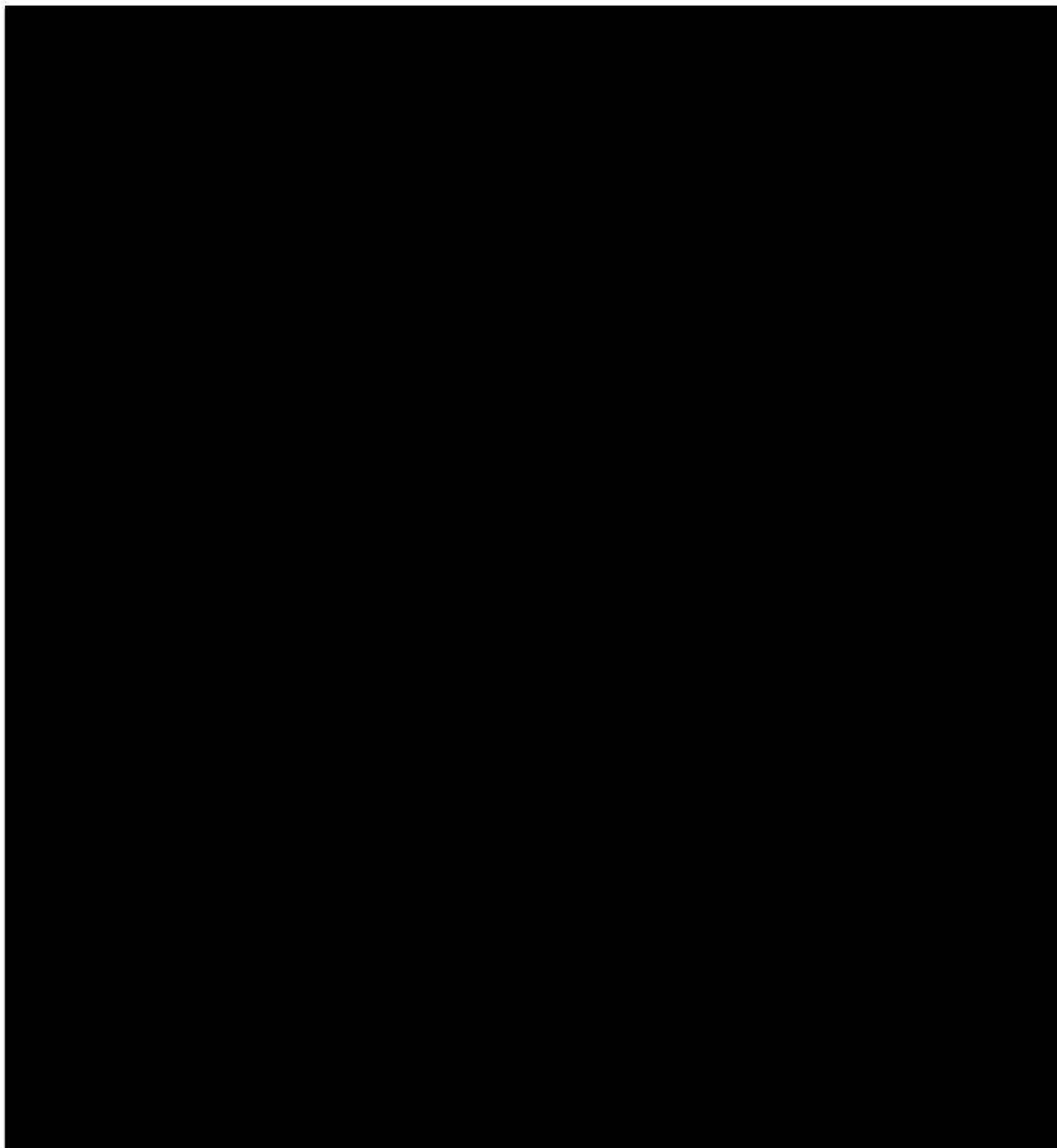
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1 LDC [MR. KAMMEN]: Thank you.

2 MJ [Col SPATH]: I understand that when we're not here in
3 session it's a different ----

4 LDC [MR. KAMMEN]: No, I understand. But I do need the record
5 to reflect ----

6 MJ [Col SPATH]: It's clear. Six to nine people.

7 LDC [MR. KAMMEN]: ---- because it does seem arbitrary and
8 capricious.

9 MJ [Col SPATH]: I understand. That will go to your argument.

10 LDC [MR. KAMMEN]: Okay.

11 MJ [Col SPATH]: Six to nine people when we're not here.

12 LDC [MR. KAMMEN]: Right.

13 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

14 Q. Now ----

15 A. Now just to clarify, that's my folks. There's other
16 commissions folks and everything here as well too, so.

17 Q. Well ----

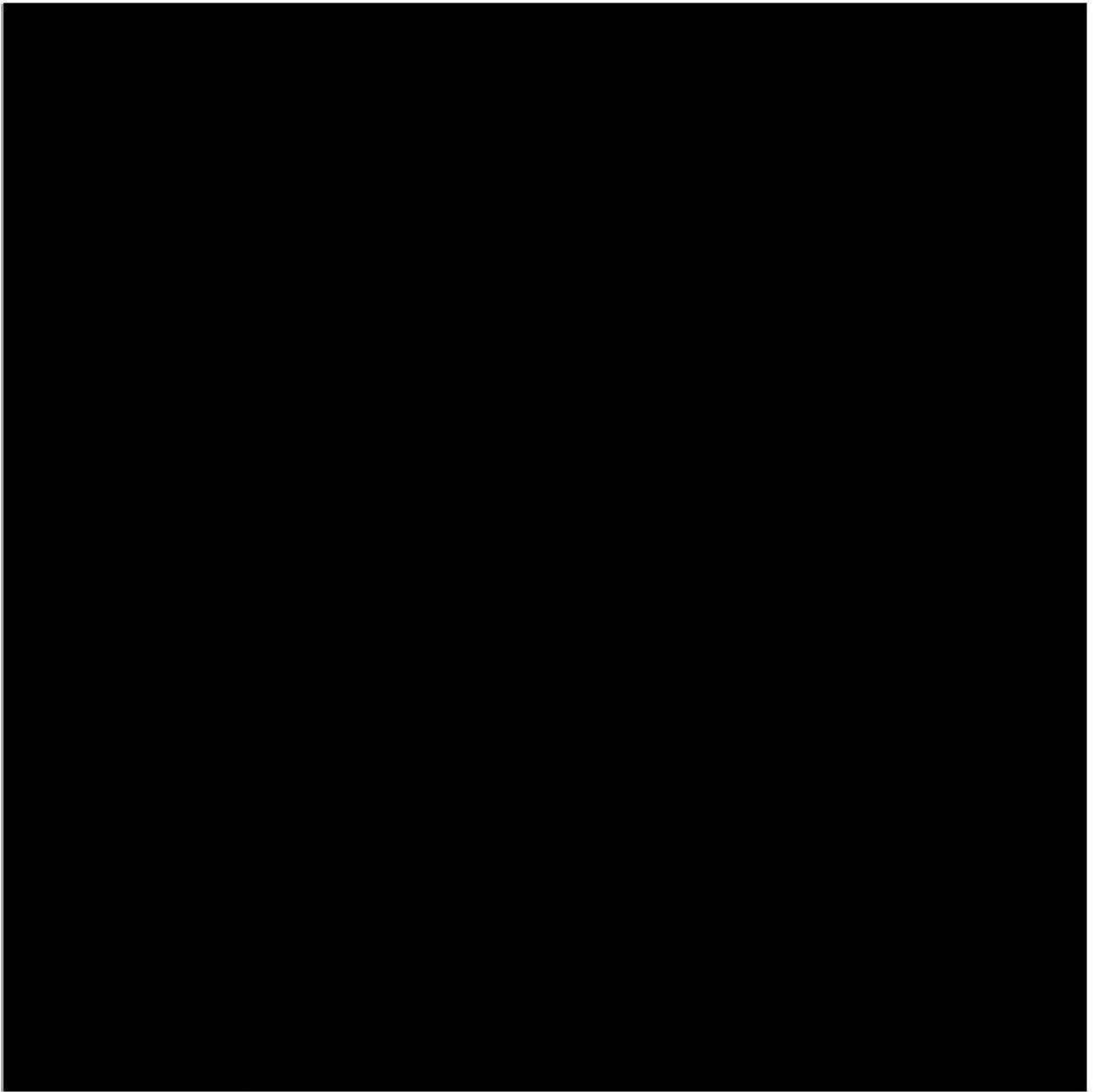
18 A. And I don't know their numbers.

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

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A. Yes, it does.

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1 Q. Okay. Because he's so significant that some unknown force
2 is going to come break him out?

3 A. Let me just put it this way. If we, if we -- imagine
4 you're in New York City doing this. How much security would they
5 have there as well if the defendant is there? It's the same thing,
6 because there's risks also to the defendant, because there's people
7 that want to take harm to the defendants.

8 Q. Right. And have you spoken with anybody in New York City
9 who runs the, the people who run the Metropolitan Correction Center
10 in New York City, to see what their guard staffing levels are
11 compared to yours?

12 A. No.

13 Q. Would it surprise you to learn that they work on a much,
14 much, much, much smaller ----

15 TC [MR. MILLER]: Judge, we're not here really ----

16 MJ [Col SPATH]: Agreed.

17 TC [MR. MILLER]: ---- to surprise him.

18 MJ [Col SPATH]: Agreed. He doesn't know. He already said it.

19 LDC [MR. KAMMEN]: Okay.

20 Q. Now -- and are you generally aware that people alleged to
21 be terrorists are held in various detention facilities in New York
22 City, in Chicago, and other major metropolitan areas?

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1 A. I'm aware that people -- there's people that have been
2 convicted of different things as well, but I don't know of any that
3 has not been convicted.

4 Q. Well, you're not aware, though, where people ----

5 A. I'm sure there's people. I'm not tracking everything
6 around there in the U.S. judicial system.

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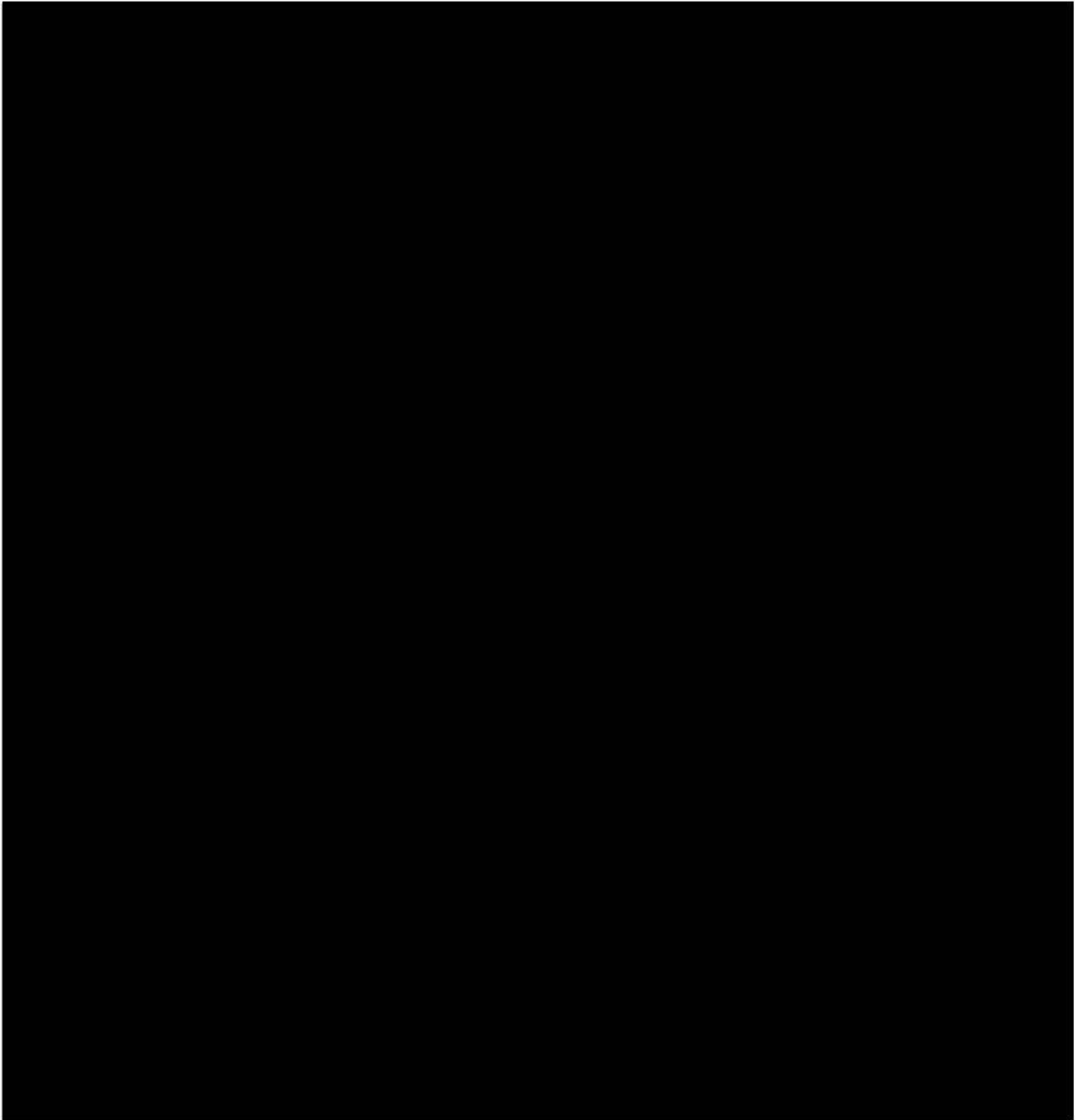
22 A. Yes.

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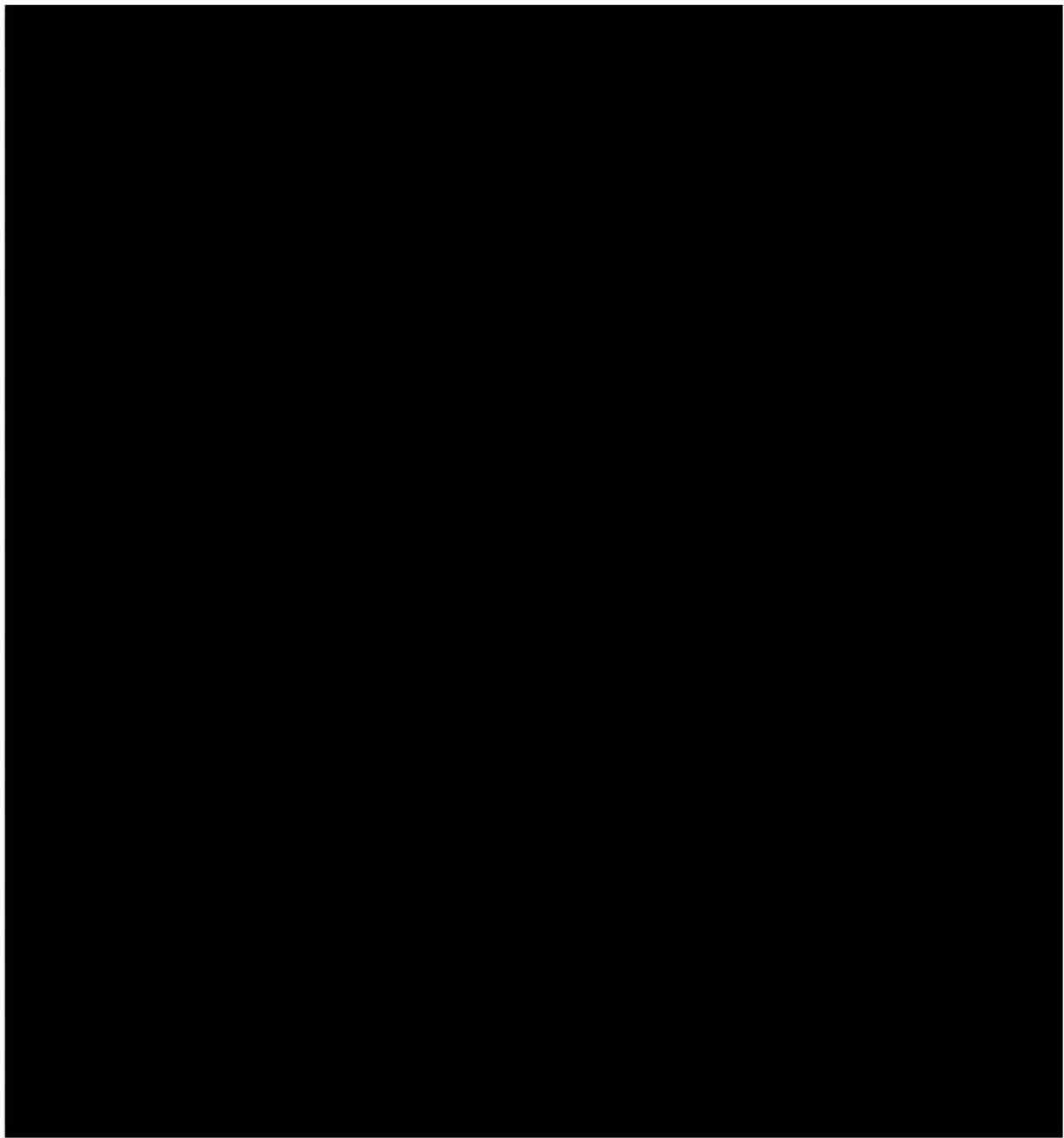
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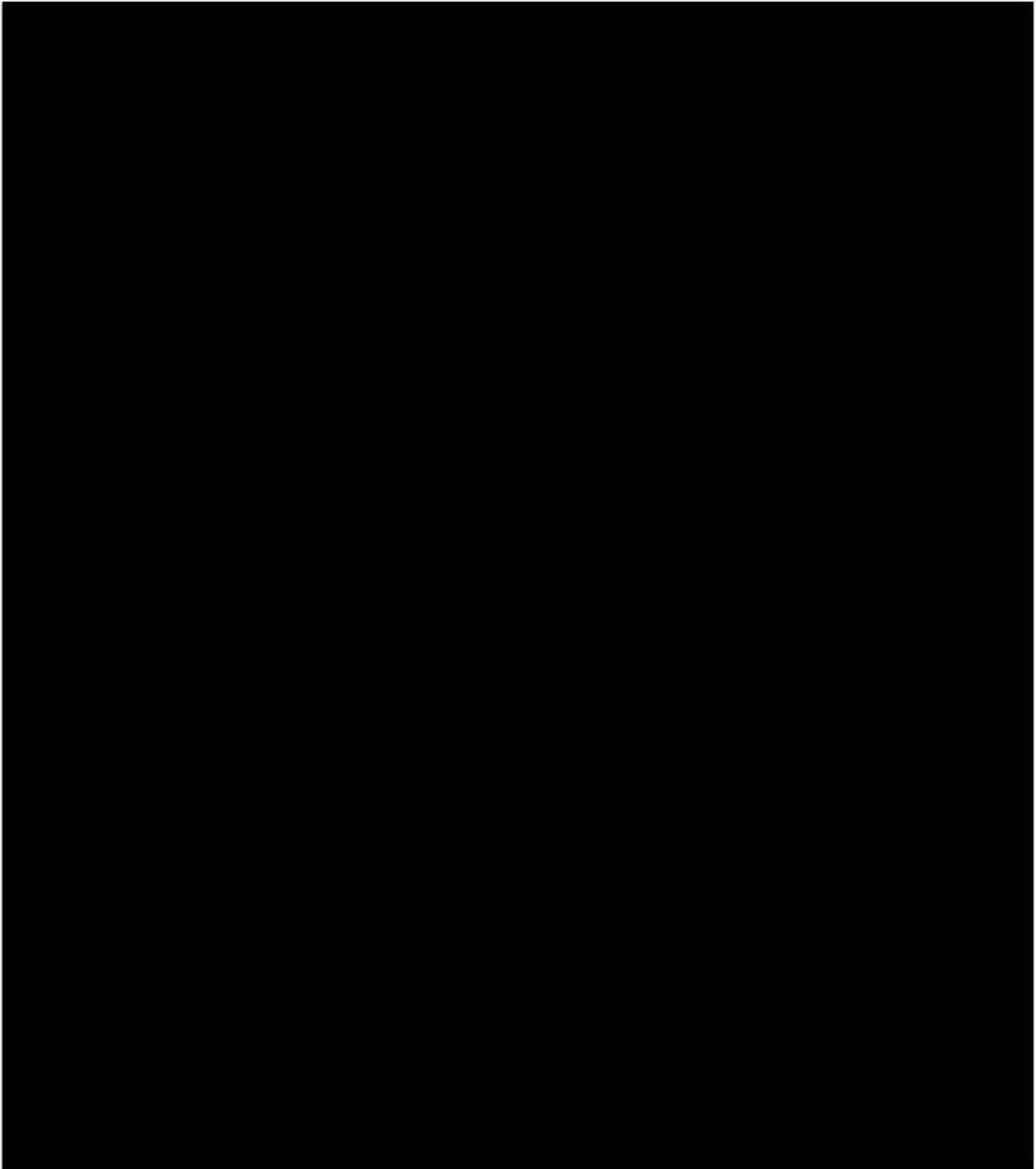
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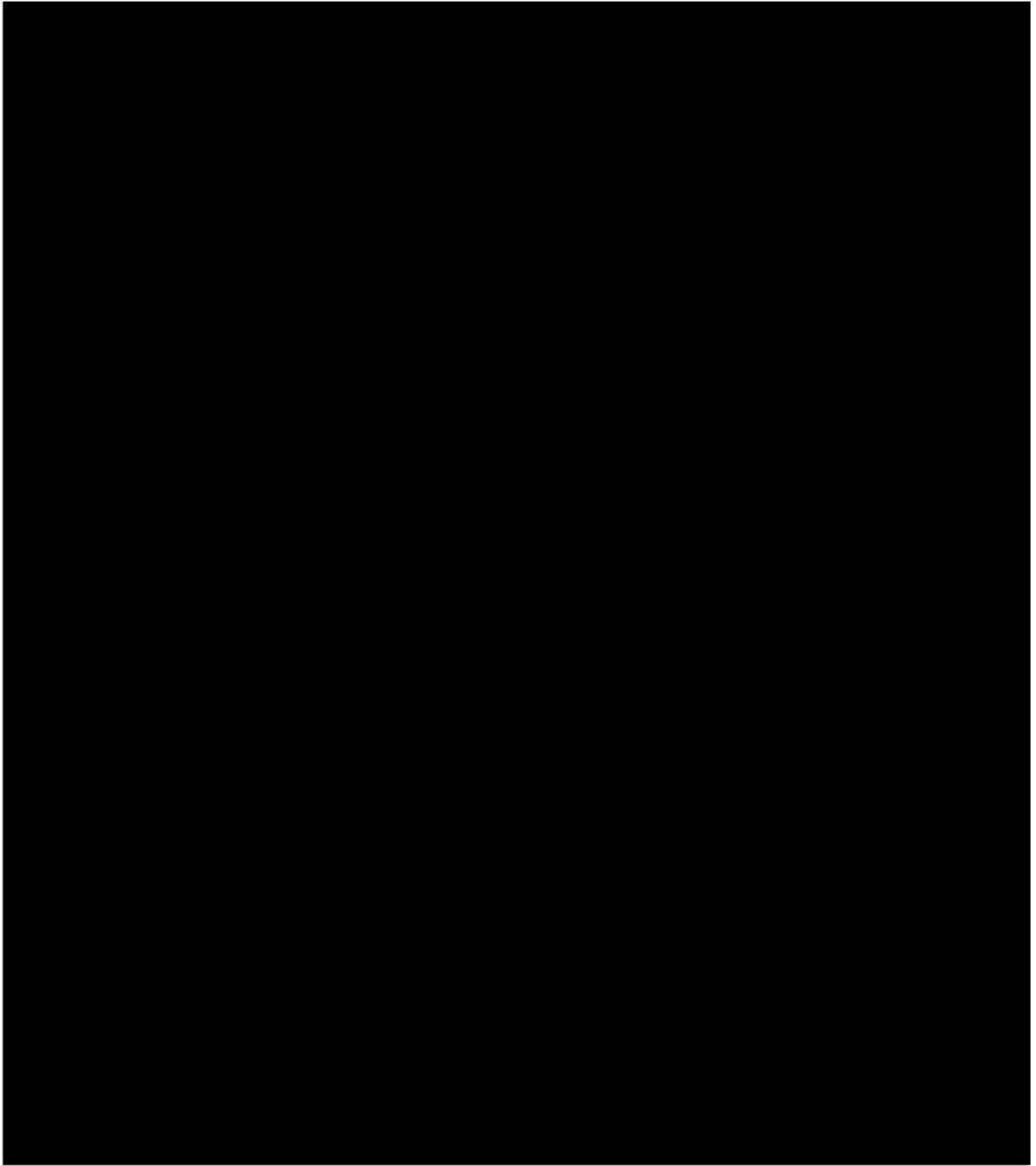
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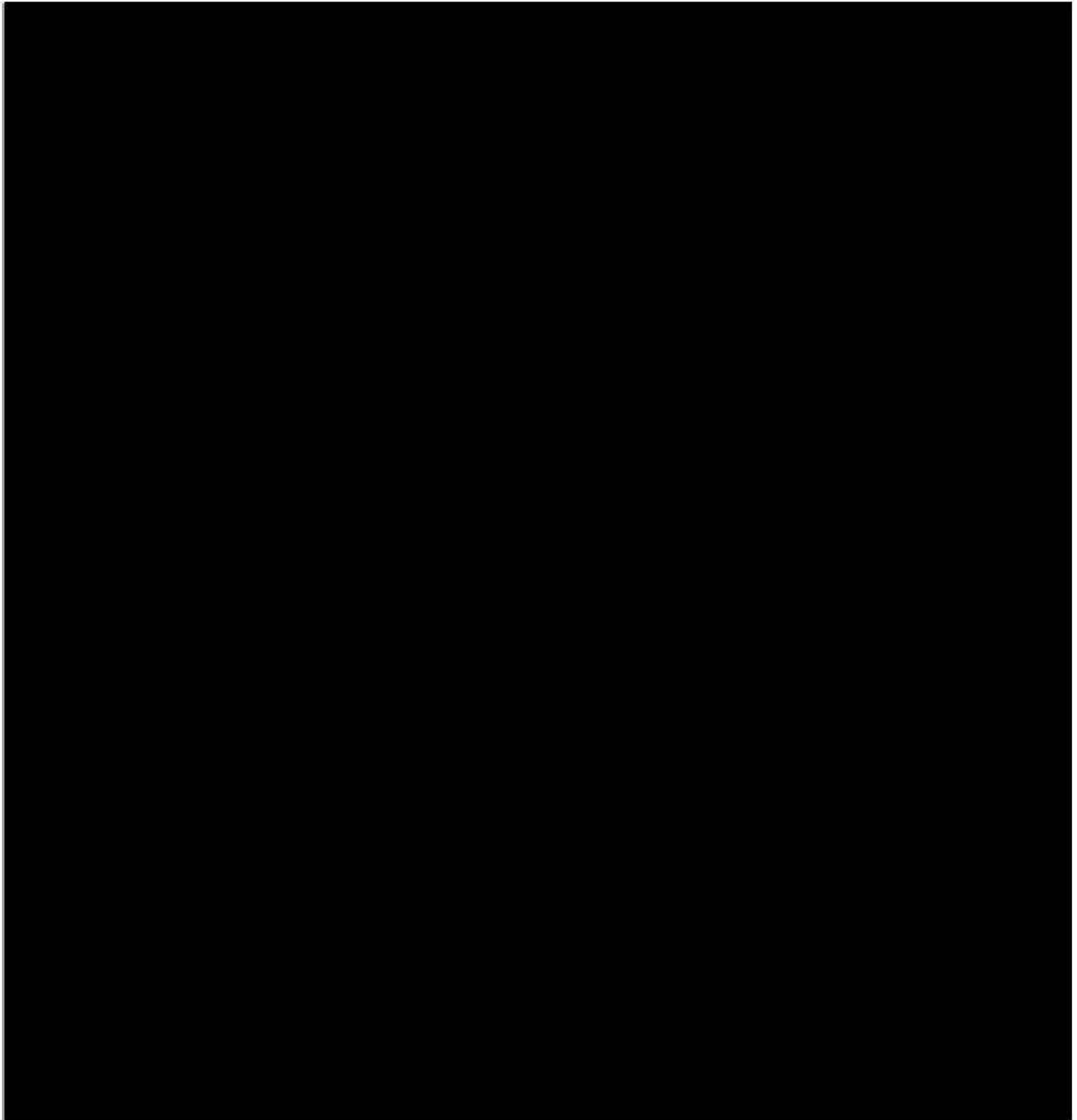


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1 Q. Yeah.

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7 Q. All right.

8 A. That I do not know.

9 Q. I'm sorry?

10 A. That I do not know.

11 Q. You don't know?

12 A. I don't know.

13 Q. Okay. Well, are you aware that the cells at other visiting
14 facilities where the detainees

15 A. Yes.

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1 Q. Okay. If a detainee who is here asks for medication, is
2 some record kept that he was or wasn't given medication while he was
3 here?

4 A. Yes, they're maintained.

5 Q. I'm sorry?

6 A. Yes, they would be maintained.

7 Q. And what are those records called?

8 A. Medical records. [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 Q. Okay. Now, have you reviewed Mr. al Nashiri's DIMS record?

13 A. I have not.

14 Q. Okay. So you're not aware of any problems or the lack of
15 problems he's had over the last several years?

16 A. No.

17 LDC [MR. KAMMEN]: Okay. Excuse me just a second, if I may.

18 **[Pause.]**

19 Q. I suspect I know the answer, but for the record, have you
20 compared your SOPs to the SOPs of any detention facilities where
21 people facing the death penalty in the continental United States are
22 kept?

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1 A. We've compared them to other federal prisons and taken
2 things from them, predominantly Fort Leavenworth.

3 Q. And have you compared your SOPs to the SOPs of the
4 U.S. Bureau of Prisons facility at -- ADX at Florence, Colorado?

5 A. Not that I'm aware of.

6 Q. Have you compared your SOPs to the SOPs of the Special
7 Management Unit at Terre Haute, Indiana?

8 A. All I can tell you is we compared it to the general federal
9 standards of prisons as well as Fort Leavenworth. Beyond that, I'm
10 not aware.

11 Q. Okay.

12 A. SOPs were developed over 14 years and ----

13 Q. Right. And ----

14 LDC [MR. KAMMEN]: Excuse me just a second.

15 **[Pause.]**

16 Q. If one of the detainees is speaking in Arabic, do you --
17 what facilities do you have when he is here at the ELC to address
18 that? Do you have Arabic speakers here?

19 A. We have -- I'm not sure what we have out here,
20 interpreters. I don't manage the interpreters out here at this site.

21 [REDACTED]

22 Q. Okay. You don't know whether -- so ----

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1 A. I know what I have within Camp VII. I know what I have
2 within Camp VI.

3 Q. 

4 A. 

5 Q. 

6 A. 

7 Q. 

8 A. 

9 Q. 

10 LDC [MR. KAMMEN]: For the record, we would move to produce the
11 SOPs that he reviewed prior to his testimony.

12 MJ [Col SPATH]: Under 612 I assume.

13 LDC [MR. KAMMEN]: Well, under 612 and also just under
14 completeness so that, frankly, we could examine him concerning those.
15 I mean, he's referred to them. He's talked about what they are.

16 I think, as a matter of fairness, recognizing -- you can
17 argue about whether we have a right to them or not, but you certainly
18 have the discretion to order their production.

19 We would also ask -- let me ask a few more questions.

20 Q. Have you been provided with any written threat assessments
21 conducted in 2016 concerning the threat from outside forces to the
22 ELC at Guantanamo Bay, Cuba?

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1 A. Specifically to the ELC? No. I've been provided
2 assessments to the overall operational perspective of everything
3 here.

4 Q. And were any of those created in -- when was the last --
5 the date of the last threat assessment?

6 A. The last threat assessment I received was literally from
7 the two, probably two weeks ago.

8 LDC [MR. KAMMEN]: All right. We would move to produce that
9 threat assessment as well.

10 MJ [Col SPATH]: All right. You may proceed.

11 Trial Counsel, any questions?

12 TC [MR. MILLER]: Yes, Your Honor. Thank you.

13 **CROSS-EXAMINATION**

14 **Questions by the Trial Counsel [MR. MILLER]:**

15 Q. If I could, sir, starting out, what is your mission here at
16 the Camp VII?

17 A. My mission is to provide the safe, secure care and custody
18 of the detainees, as well as protect my guard force.

19 Q. So it's a dual situation?

20 A. Yes, sir.

21 Q. Both the detainees -- you're protecting the detainees --
22 excuse me, the detainees as well as the guard force?

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1 A. Yes, sir.

2 Q. And when you apply the various protocols and procedures,
3 you indicated that those procedures had been developed over a period
4 of some 14 -- I think you said 14 years; is that correct?

5 A. Yes, sir.

6 Q. So you are constantly updating those, reviewing them to
7 ensure that they're the most effective set of protocols and standards
8 that you can have?

9 A. At a minimum every nine months, and that's bare minimum,
10 and then also as required or as changes come about.

11 Q. And that was my next question. What prompts you to do such
12 a review? You indicated there is a mandatory one every nine months?

13 A. Yes, sir.

14 Q. And do you do it -- if you see something that needs
15 changing, do you institute some sort of review?

16 A. Yes, sir, we do.

17 Q. All right. Now, you are familiar with the defendant,
18 correct?

19 A. I'm familiar with him to a degree, yes, sir.

20 Q. And you recognize -- I guess we all agree he's what we call
21 an HVD?

22 A. Correct. Yes, sir.

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1 Q. There are various other HVDs at the facility; is that
2 correct?

3 A. That is true.

4 Q. Now, the protocols/procedures that you employ there at the
5 camp, are they applied in the same manner to all the HVDs?

6 A. Yes, they are.

7 Q. Now, is there a reason that you standardize procedures and
8 protocols?

9 A. Oh, absolutely.

10 Q. Why is that, sir?

11 A. Number one, by standardizing the protocols/procedures, we
12 prevent there from being significant issues or incidents based upon
13 people not understanding what they're supposed to be doing or taking
14 a deviation from what the SOP states.

15 So by -- it ensures the consistent care and custody of the
16 detainees. It guarantees the consistent functioning and operation of
17 the mission, of the facilities, and then the protection of our guard
18 force.

19 Q. All right. So standardization allows for consistency?

20 A. Yes, sir.

21 Q. Do you think it's more efficient in a cost sense?

22 A. Yes, sir.

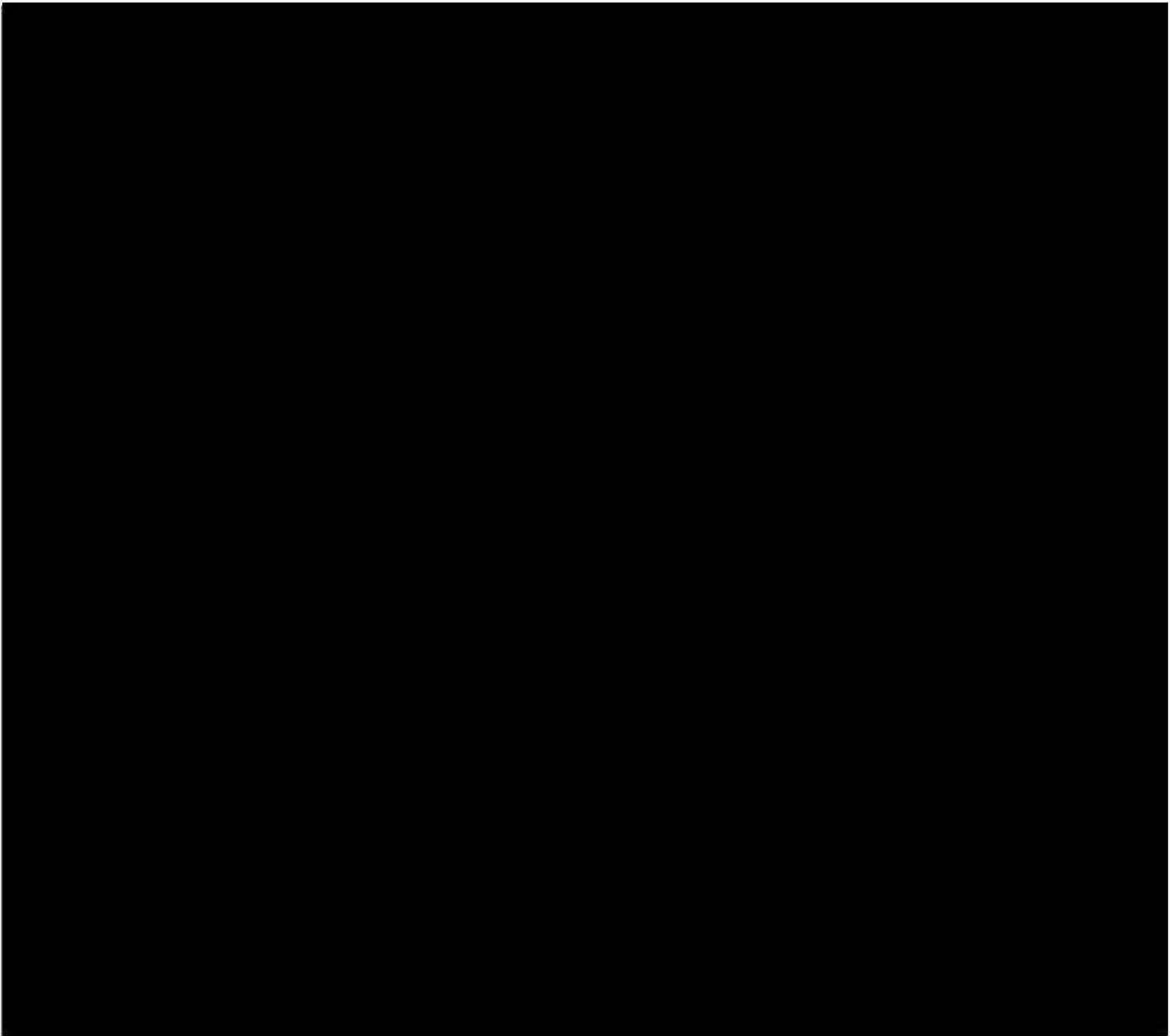
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1 Q. Is it more effective, in the sense that we're doing the
2 same things over and over again, we get better at them in providing
3 the care of the detainees and the protection of both them and the
4 guard force?

5 A. Absolutely.

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1 [REDACTED]

2 A. Yes, sir. And everything is reviewed in its entirety.

3 Q. All right. You were asked a number of questions about the
4 psychiatric or medical history of Mr. Nashiri, correct?

5 A. I was, yes, sir.

6 Q. And you indicated for the most part you were unfamiliar
7 with that?

8 A. Correct.

9 Q. But there are medical and psychiatric personnel at the
10 camp; is that correct?

11 A. That is correct.

12 Q. And are they responsible for tending to those particular
13 issues?

14 A. They are.

15 Q. And you are -- I take it you have a professional
16 relationship with those doctors ----

17 A. I do.

18 Q. -- and psychiatrists; is that correct?

19 A. Yes.

20 Q. And when there are issues involving the medical care or the
21 psychiatric care of a particular HVD, do they inform you of those
22 particular conditions and any corrective action that needs to be

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1 taken?

2 A. Yes, they do. We meet at a minimum of twice a week. And
3 if there's any other incidents or anything to have to come to my
4 attention, they bring them to my attention.

5 Q. So it is their responsibility, and they're under your
6 supervision, I take it. So they ensure that those things are taken
7 and they bring that to your attention and that's how those matters
8 are handled, correct?

9 A. Right.

10 Q. You're not a doctor?

11 A. No.

12 Q. You're not a psychiatrist by training?

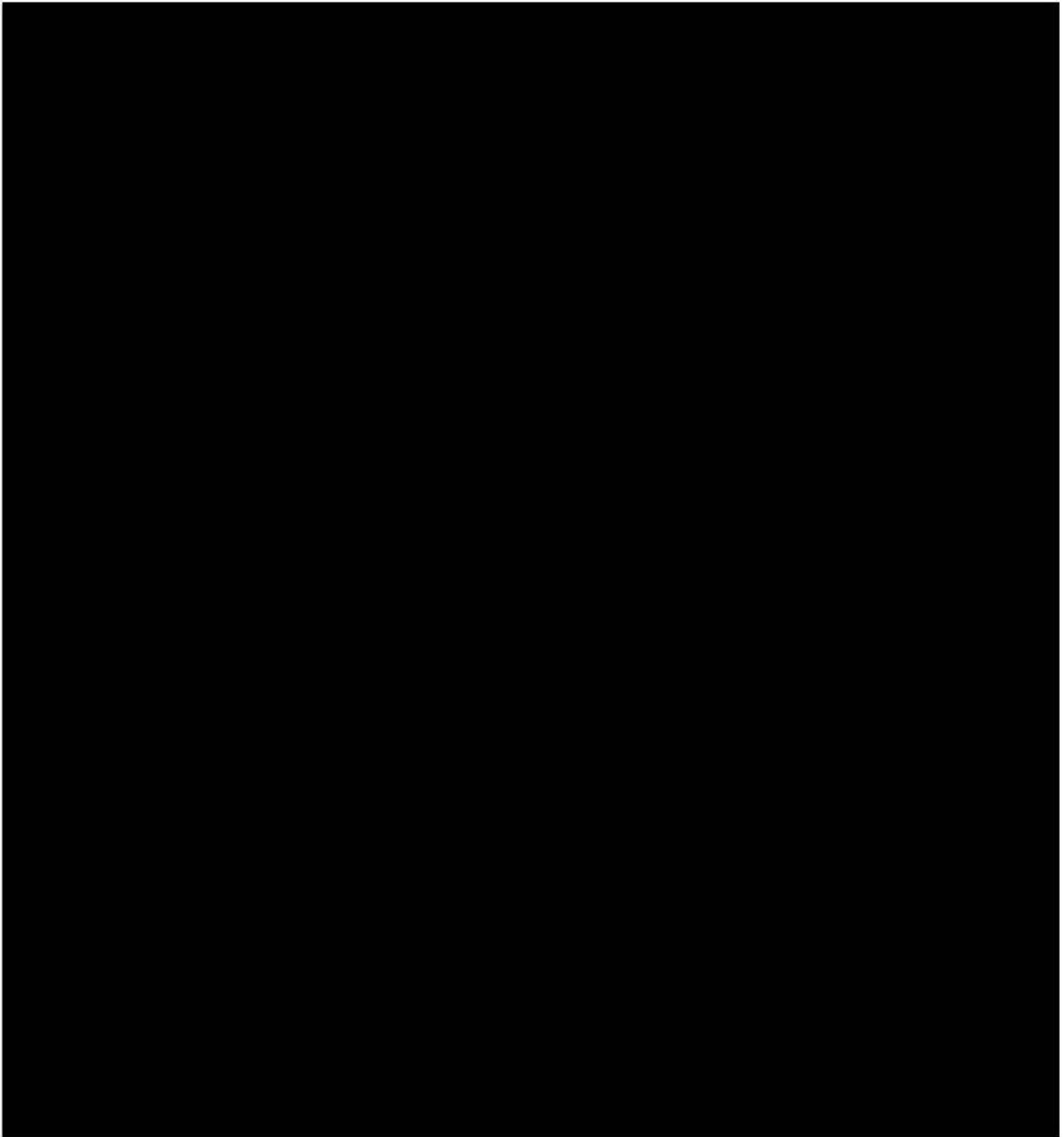
13 A. I am not.

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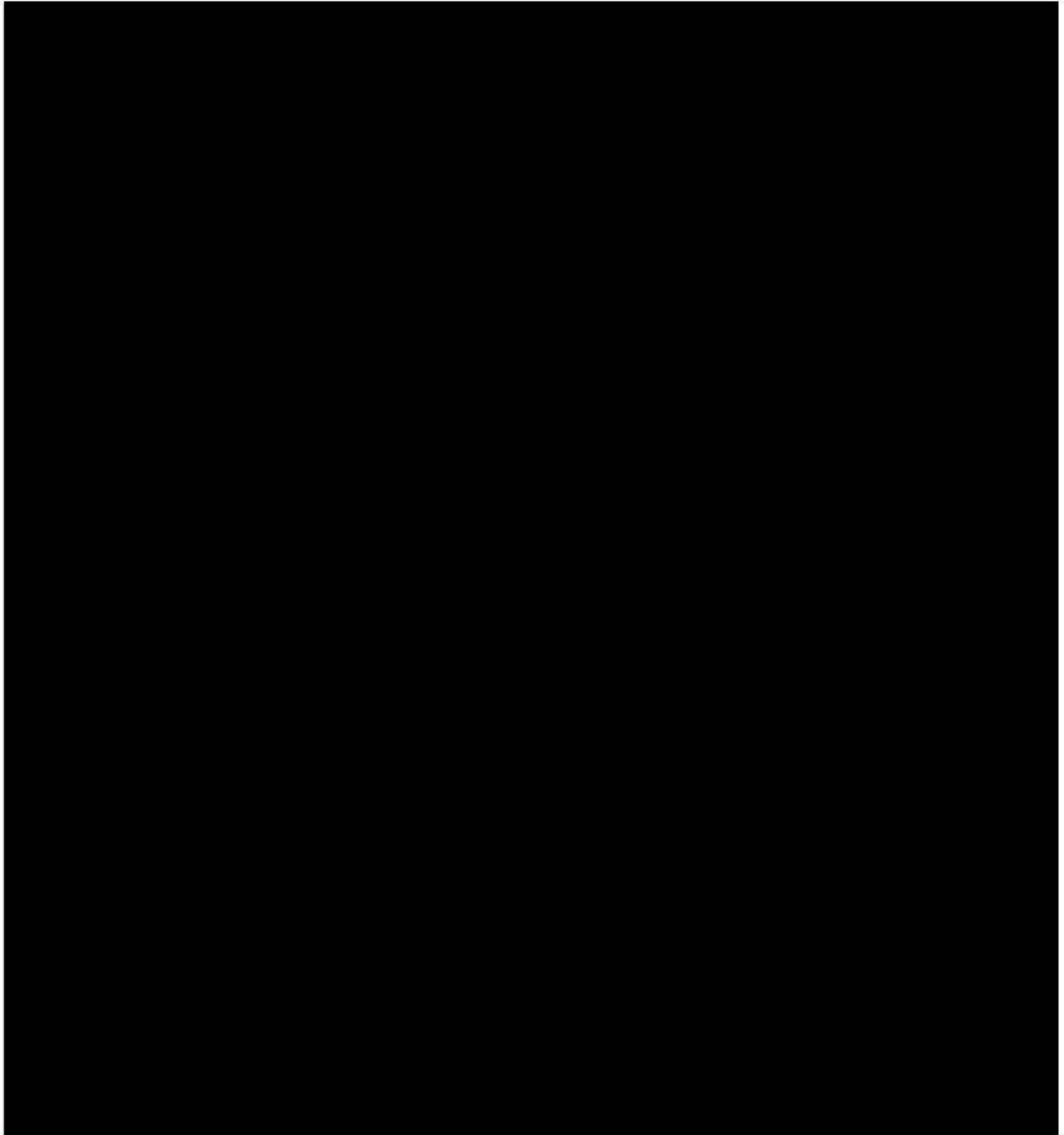
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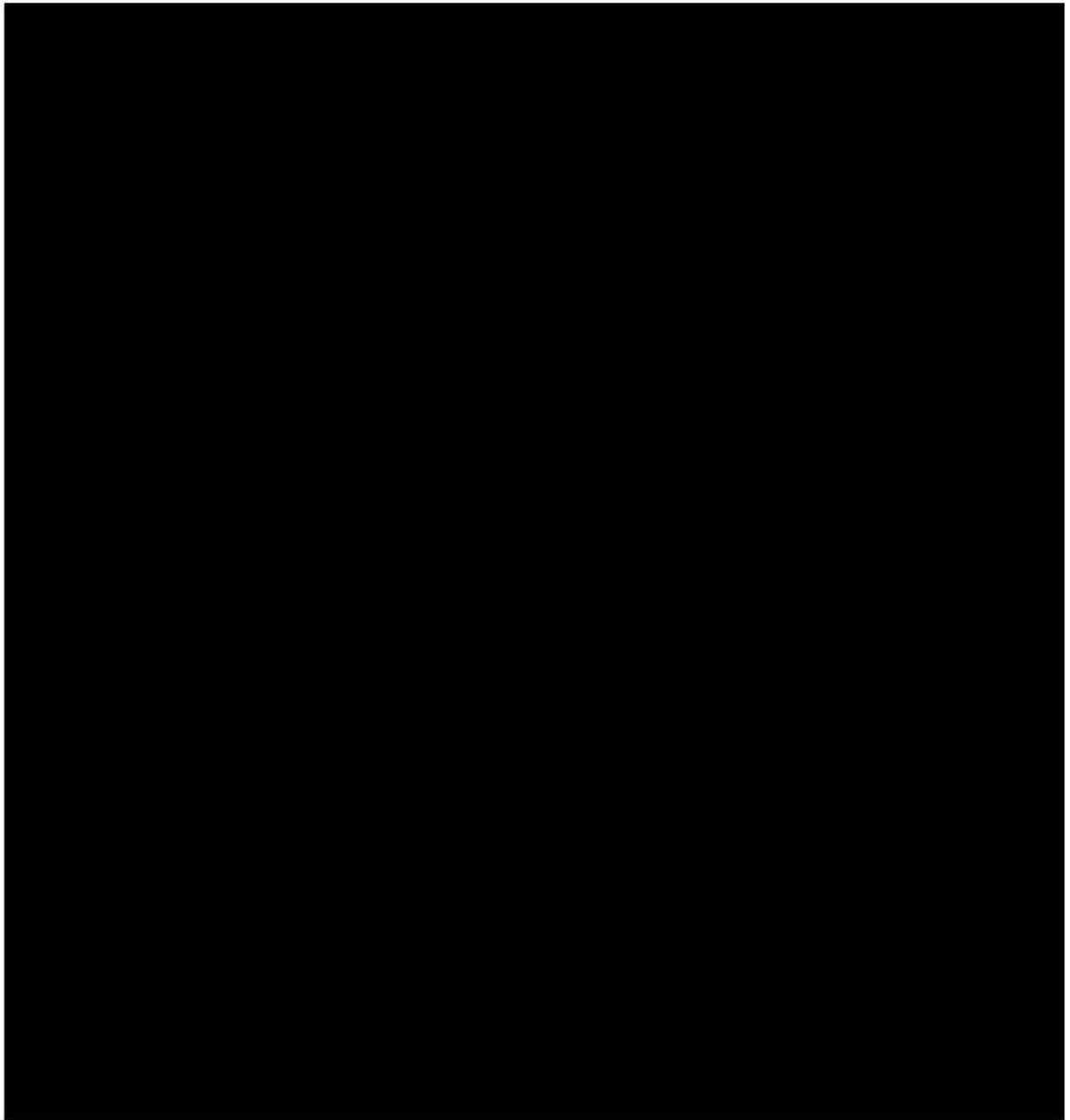
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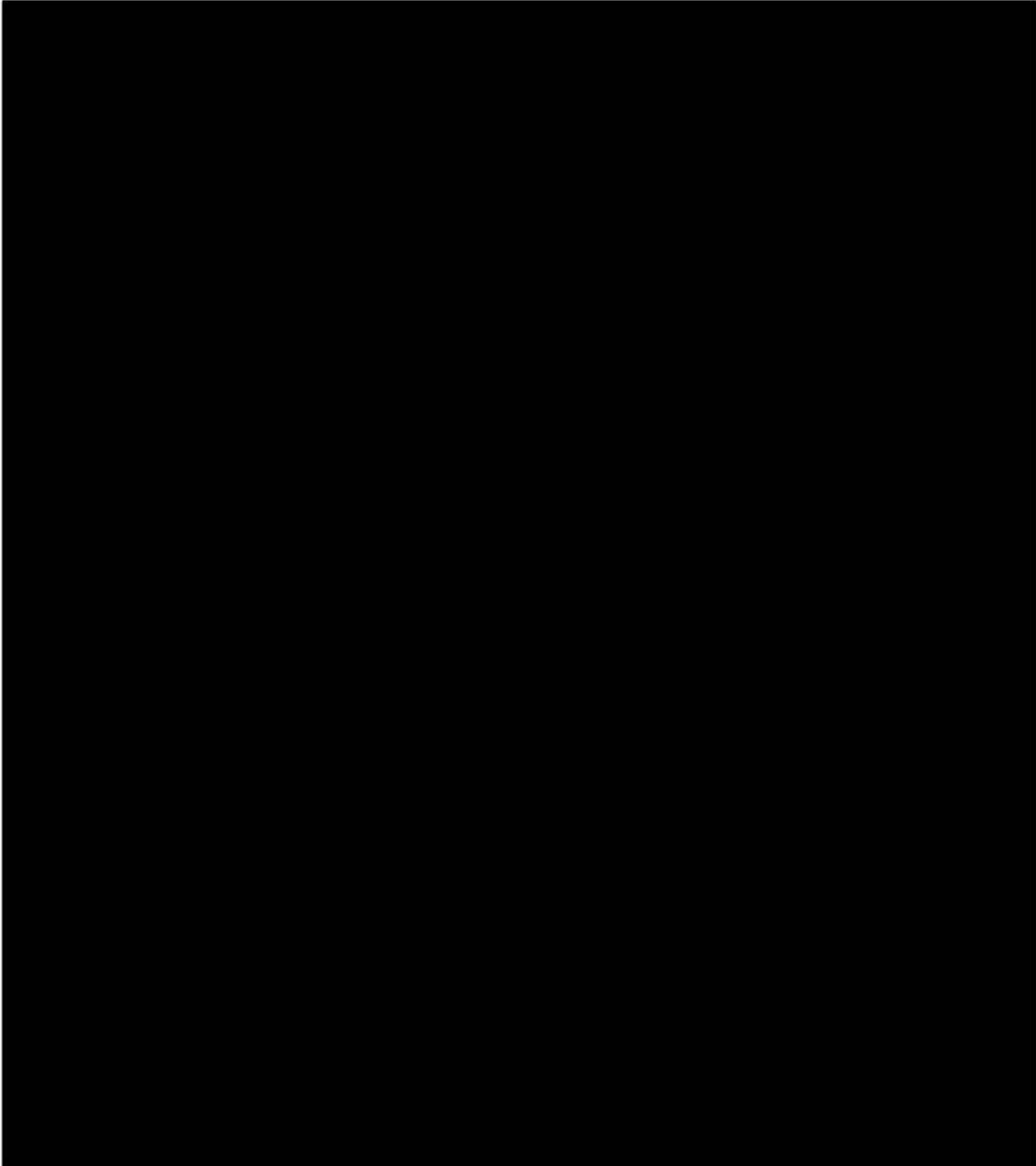
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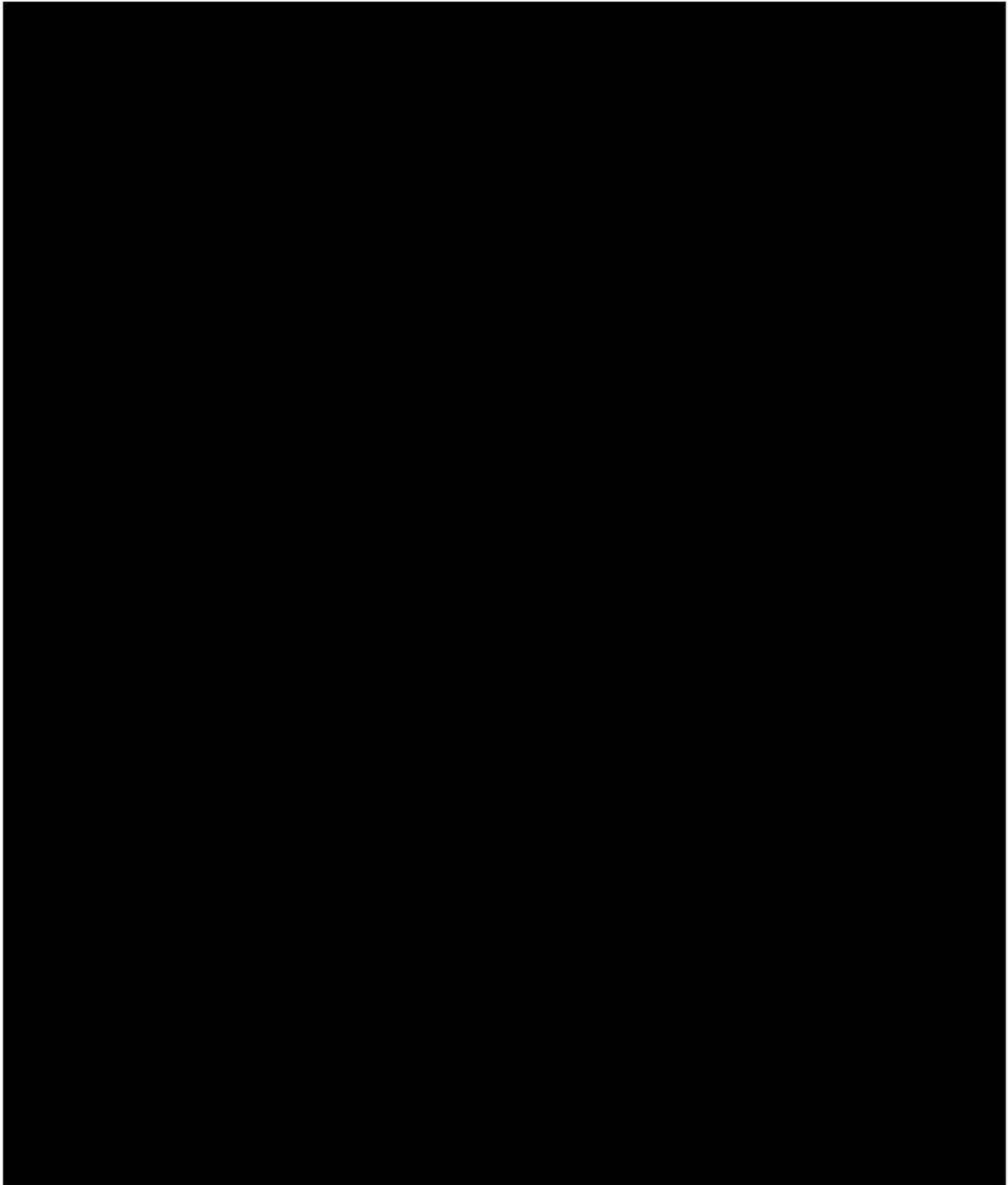
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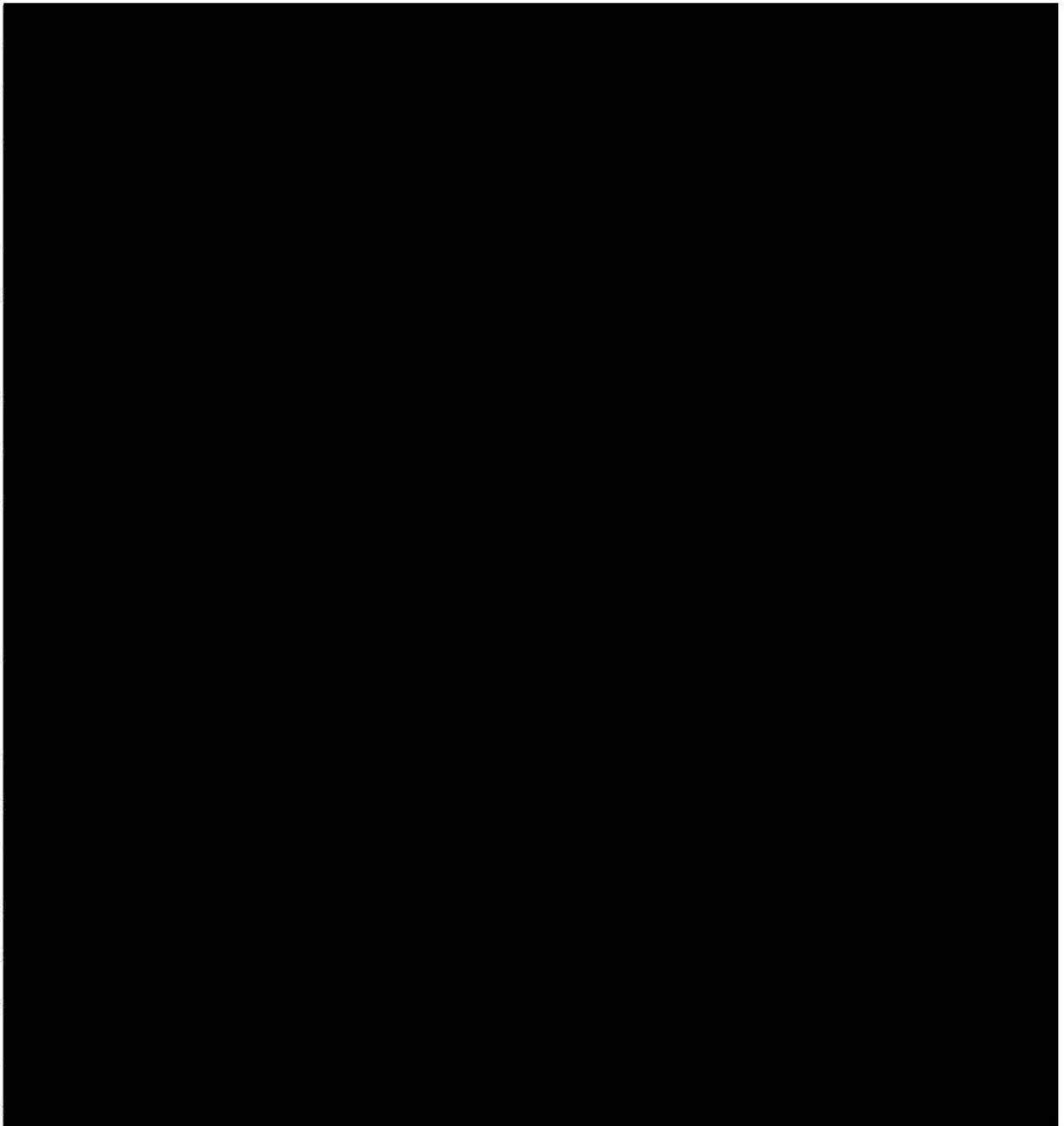
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4 Q. Now, Mr. Kammen indicated to you that an inmate is not
5 required to go to the doctor or to seek psychiatric care, correct?

6 A. That is correct.

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8 Q. But aren't you required, as a -- as head of this particular
9 facility, to make that available to them, if they want it?

10 A. Yes, sir.

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18 MJ [Col SPATH]: I understand.

19 LDC [MR. KAMMEN]: Okay. So I object to the form of the
20 question.

21 TC [MR. MILLER]: I'll rephrase it, Your Honor.

22 MJ [Col SPATH]: You may. All right.

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1 Q. If he was to be housed here on a permanent or semipermanent
2 basis ----

3 LDC [MR. KAMMEN]: Excuse me. Same objection. Not what we're
4 asking for.

5 TC [MR. MILLER]: Well, if we're going to have a trial that
6 lasts months ----

7 MJ [Col SPATH]: Hey, everybody, I understand. I get to rule on
8 the objections.

9 Overruled. You may proceed. You may proceed.

10 TC [MR. MILLER]: Thank you.

11 MJ [Col SPATH]: You'll have redirect.

12 Q. If he was to be here on a permanent or semipermanent basis,
13 overnight for a week or two weeks, months, would you have to provide
14 medical care, to have medical care here for him?

15 A. Yes, I would.

16 Q. Psychiatric care also?

17 A. Yes, sir.

18 Q. [REDACTED]

19 A. Yes, sir.

20 Q. And these are all additional costs, or you would have to
21 cut services over at Camp VII, one or the other?

22 A. Yes, sir. [REDACTED]

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8 A. Yes, sir.

9 Q. And is that a standard practice for all the HVDs, moving

10 them back and forth from court?

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22 A. It is.

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1 Q. And, again, that promotes consistency?

2 A. Consistency as well as security.

3 TC [MR. MILLER]: I have nothing further. Thank you, Your
4 Honor.

5 MJ [Col SPATH]: All right. Thanks. Mr. Kammen, before we do
6 your redirect, let's take a brief recess. We'll come back and keep
7 going. We'll take a break for ten minutes. We're in recess.
8 Thanks.

9 **[The R.M.C. 806 session recessed at 1059, 16 December 2016.]**

10 **[The R.M.C. 806 session was called to order at 1105,**
11 **16 December 2016.]**

12 MJ [Col SPATH]: Commissions are called back to order, this 806
13 hearing. All the parties who were present before we recessed are
14 again present. The witness remains on the stand. I know you know
15 this ----

16 TC [MR. MILLER]: Your Honor ----

17 MJ [Col SPATH]: ---- you are still under oath.

18 Mr. Miller.

19 TC [MR. MILLER]: I apologize for the interruption.

20 We would just note for the record that Mr. [REDACTED]
21 [REDACTED] has not returned and will not return for this portion.

22 MJ [Col SPATH]: Okay. I know he's not one of the parties, but

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1 you did identify him as being in here before. All right. Thank you.

2 Mr. Kammen.

3 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

4 Q. I want to make sure we're all on the same page. Are you
5 aware that everybody who comes to Guantanamo Bay has to be approved
6 by the base commander before they're allowed access?

7 A. Those that come here legally, yes.

8 Q. Well of course, those that come here legally.

9 And so as part of that decision to allow people to come
10 here legally, are you aware that the base commander makes some modest
11 inquiry to make sure that they're not a threat?

12 A. Yes.

13 Q. Okay. So the -- are you comfortable that the people who
14 come here legally are a manageable threat?

15 A. Generally speaking, yes.

16 Q. Okay. Generally speaking. So -- and you said that part of
17 your -- your mission is to protect Nashiri, and part of your mission
18 is to protect the people around the case, right?

19 A. Yes, sir.

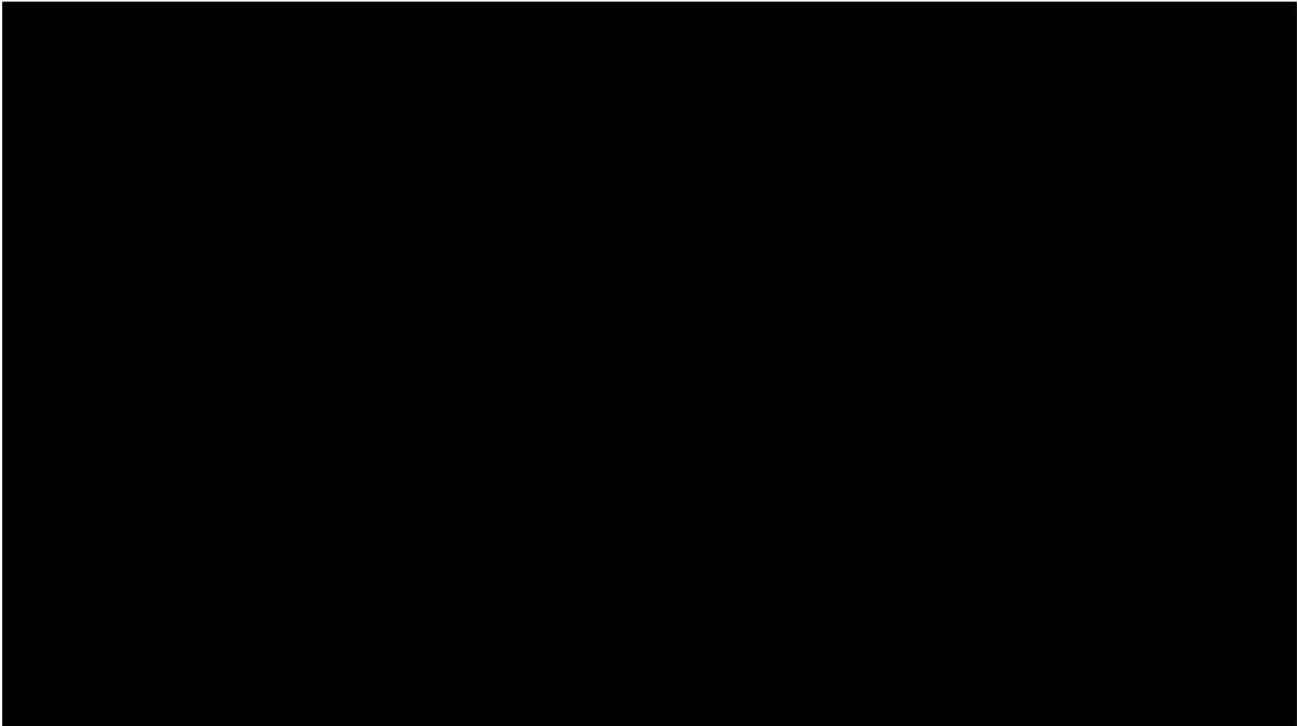
20 Q. So that when we're here in the ELC, we are safe from these
21 people who would do us harm, right?

22 A. Yes, sir.

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TC [MR. MILLER]: Objection, Your Honor. That is argumentative.

MJ [Col SPATH]: It's argumentative.

LDC [MR. KAMMEN]: No, I understand, but I just want to make the point.

TC [MR. MILLER]: I -- objection.

MJ [Col SPATH]: Again, I get to rule on the objections. We do that all the time in court. Let's stop talking over each other.

Objection sustained.

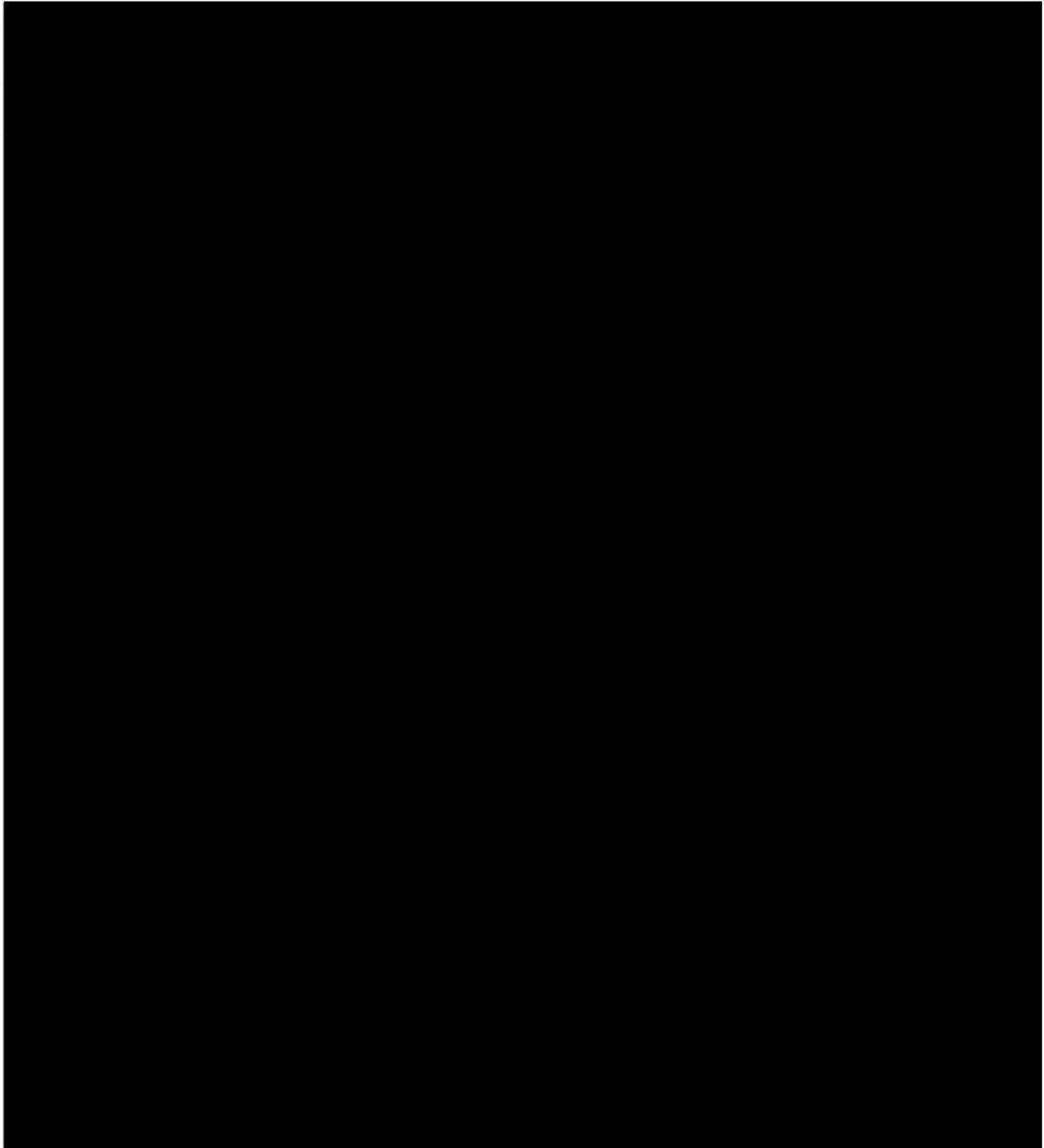


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15 LDC [MR. KAMMEN]: Again, we would renew our request to see
16 that.

17 MJ [Col SPATH]: I understand.

18 Q. Now ----

19 MJ [Col SPATH]: I assume a motion to compel will be filed from
20 the defense team.

21 LDC [MR. KAMMEN]: Well, if it's denied. I mean ----

22 MJ [Col SPATH]: Maybe the government will provide it to you.

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1 Maybe there will be some discussion.

2 LDC [MR. KAMMEN]: Oh, I see. Okay. Is that how you want to do
3 it?

4 MJ [Col SPATH]: But for me, yes. But ask the government ----

5 LDC [MR. KAMMEN]: Okay, so ----

6 MJ [Col SPATH]: I'm hoping, as always -- I know that the
7 standards here -- at least the SOPs at one point are out in the
8 public, and so at least at one point we know what they look like.
9 Maybe there's some agreement and you'll get to see them without a
10 fight.

11 LDC [MR. KAMMEN]: You never know. But I just want to make sure
12 what you want us to do is file the request with them as opposed ----

13 MJ [Col SPATH]: Yes, please, and then ----

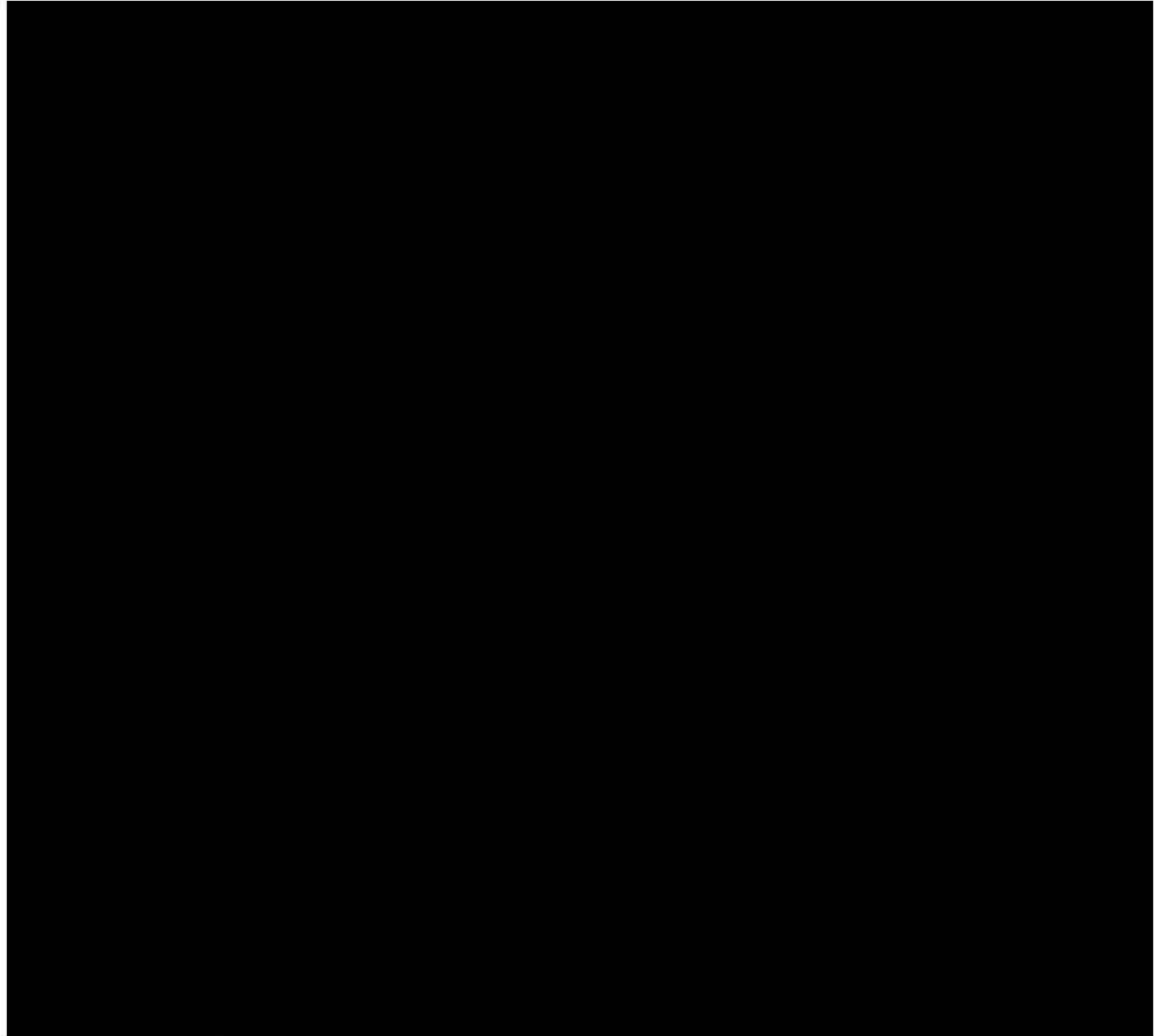
14 LDC [MR. KAMMEN]: Okay. All right.

15 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

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20 A. I do not know.
21 Q. Would it surprise you to learn there have been none?
22 TC [MR. MILLER]: Again, surprising people is not a question,

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1 Your Honor.

2 MJ [Col SPATH]: Sustained. Sustained.

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 A. No, sir, I don't.

19 Q. Okay. [REDACTED]

20 A. [REDACTED]

21 Q. You don't know. We can argue about this. The fact is you
22 don't know.

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1 A. [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 Q. All right. So you've tried it. You've gone to one --
5 inside one of the cells and shouted something and put somebody in a
6 tent in the Camp Justice and asked, "Could you hear me?"

7 A. I personally have not.

8 Q. Okay. So how do you know it can be heard if you haven't
9 done it?

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

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20 [REDACTED]

21 [REDACTED]

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10 Q. So you under ----

11 A. ---- based upon ----

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14 A. That's the process we utilize.

15 Q. Okay. And that's how you run the camp in your facilities
16 now?

17 A. Yes.

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5 TC [MR. MILLER]: Objection, Judge. I think we're going beyond
6 the scope of why we're here today. I don't know that this is
7 relevant to our inquiry.

8 MJ [Col SPATH]: Yeah, let me -- what's the relevance,
9 Mr. Kammen?

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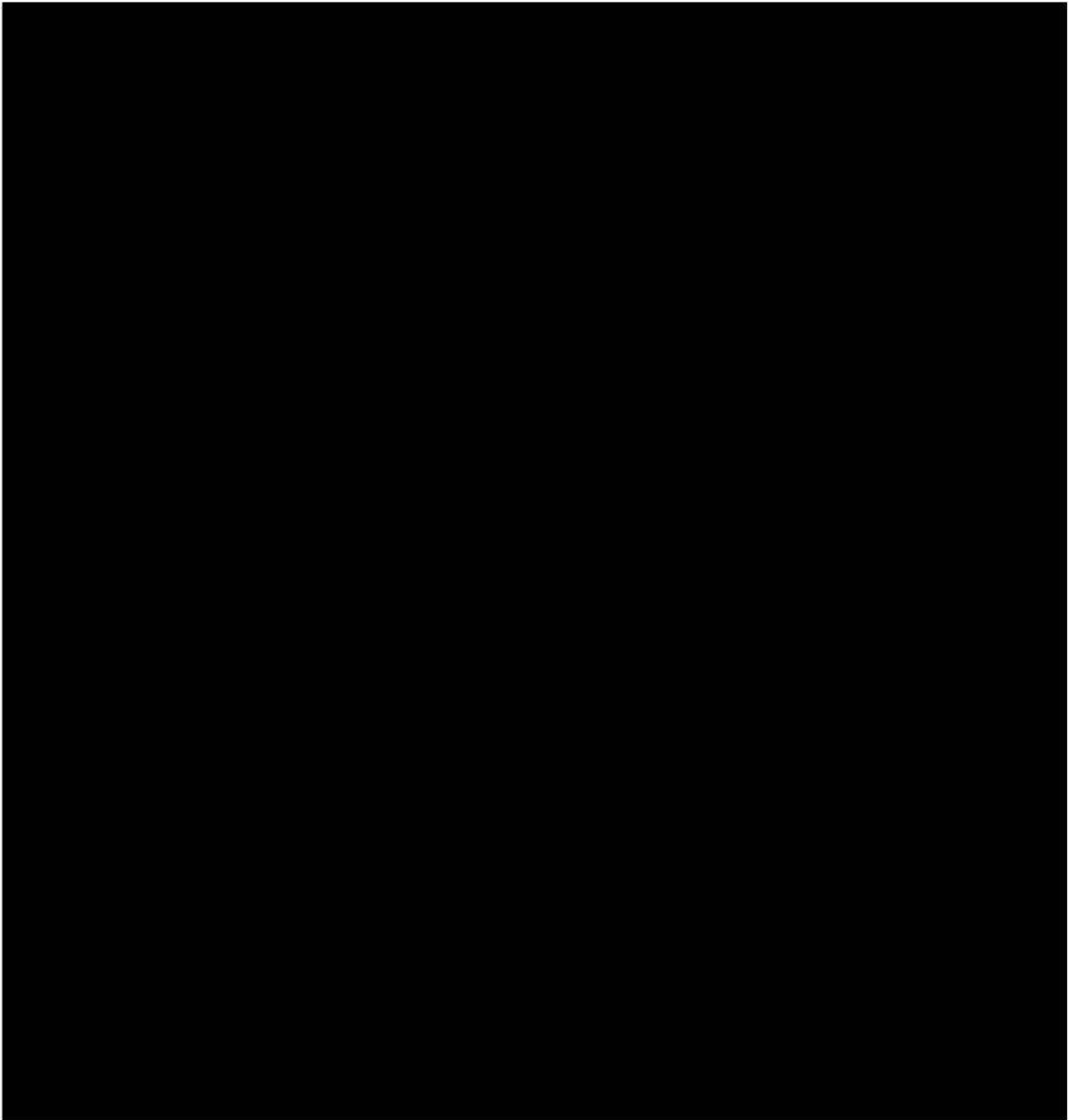
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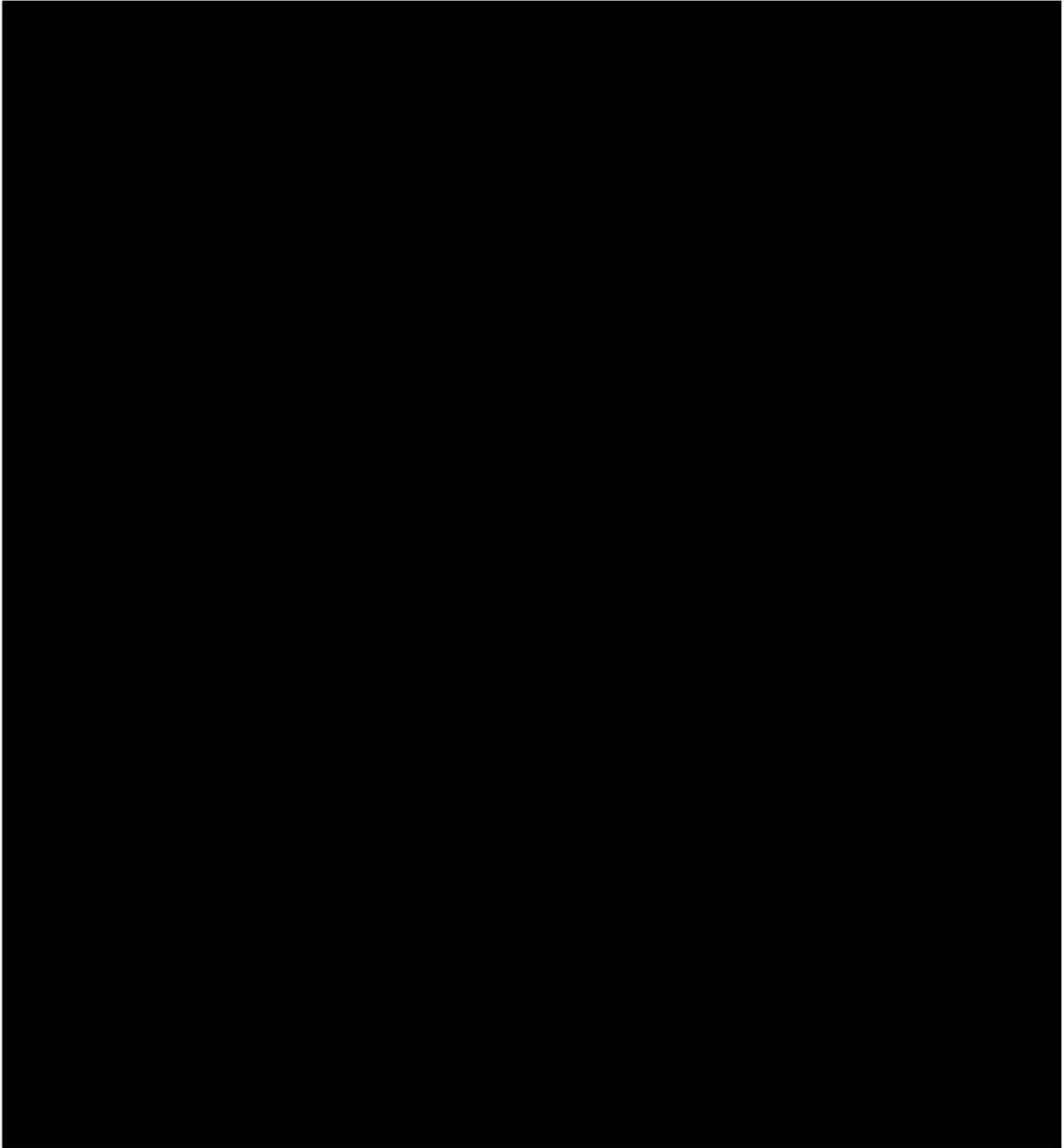
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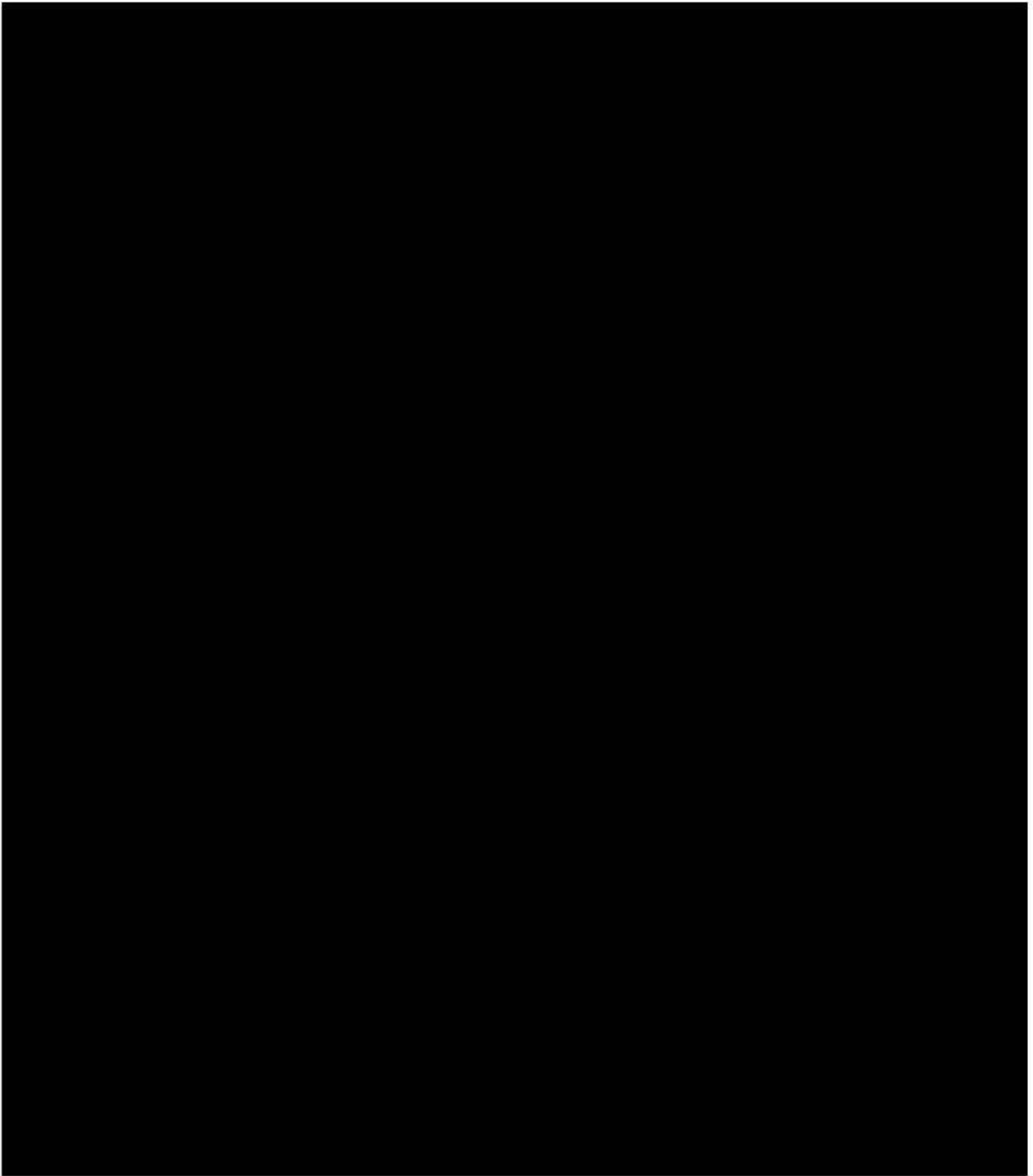
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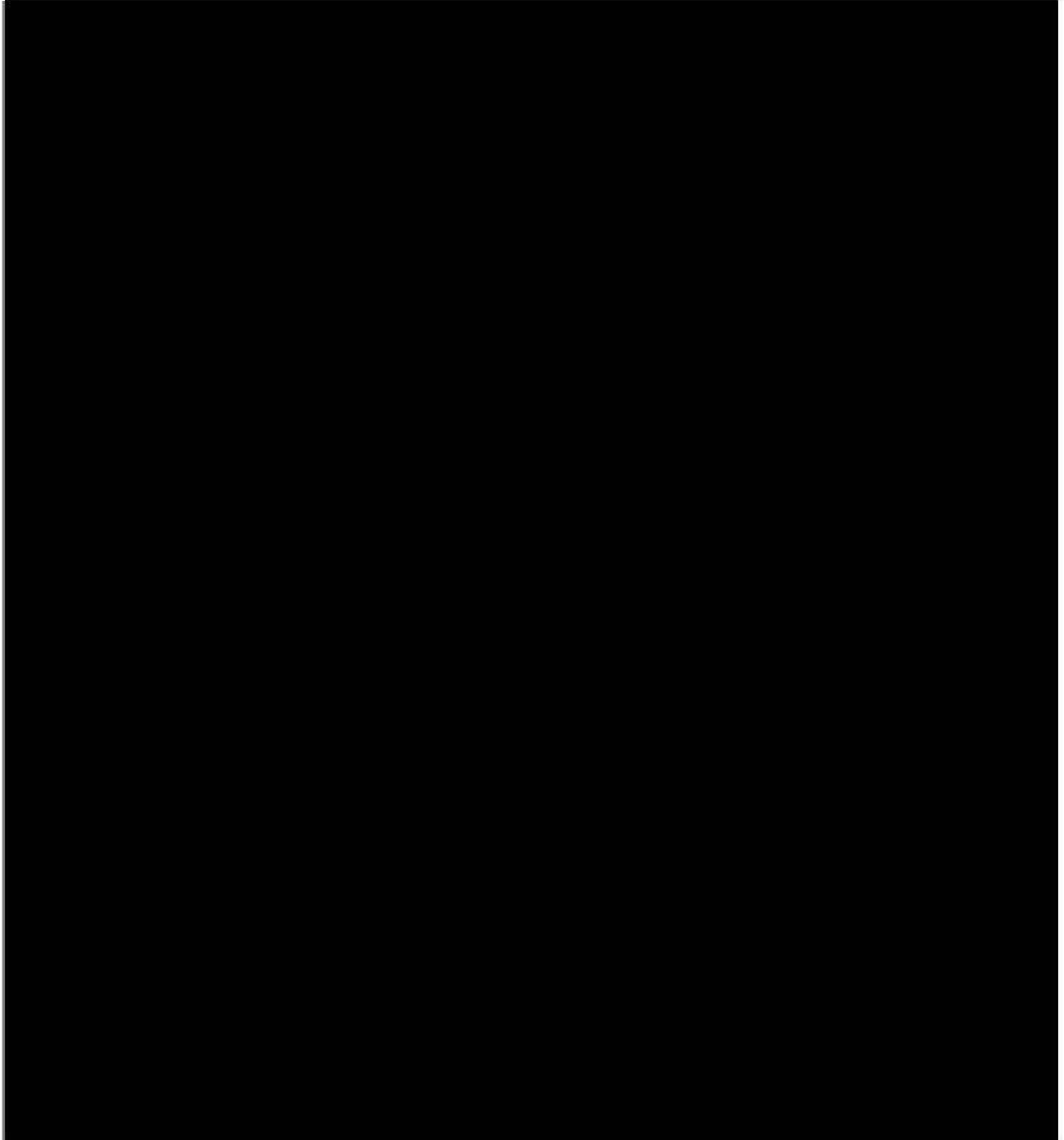
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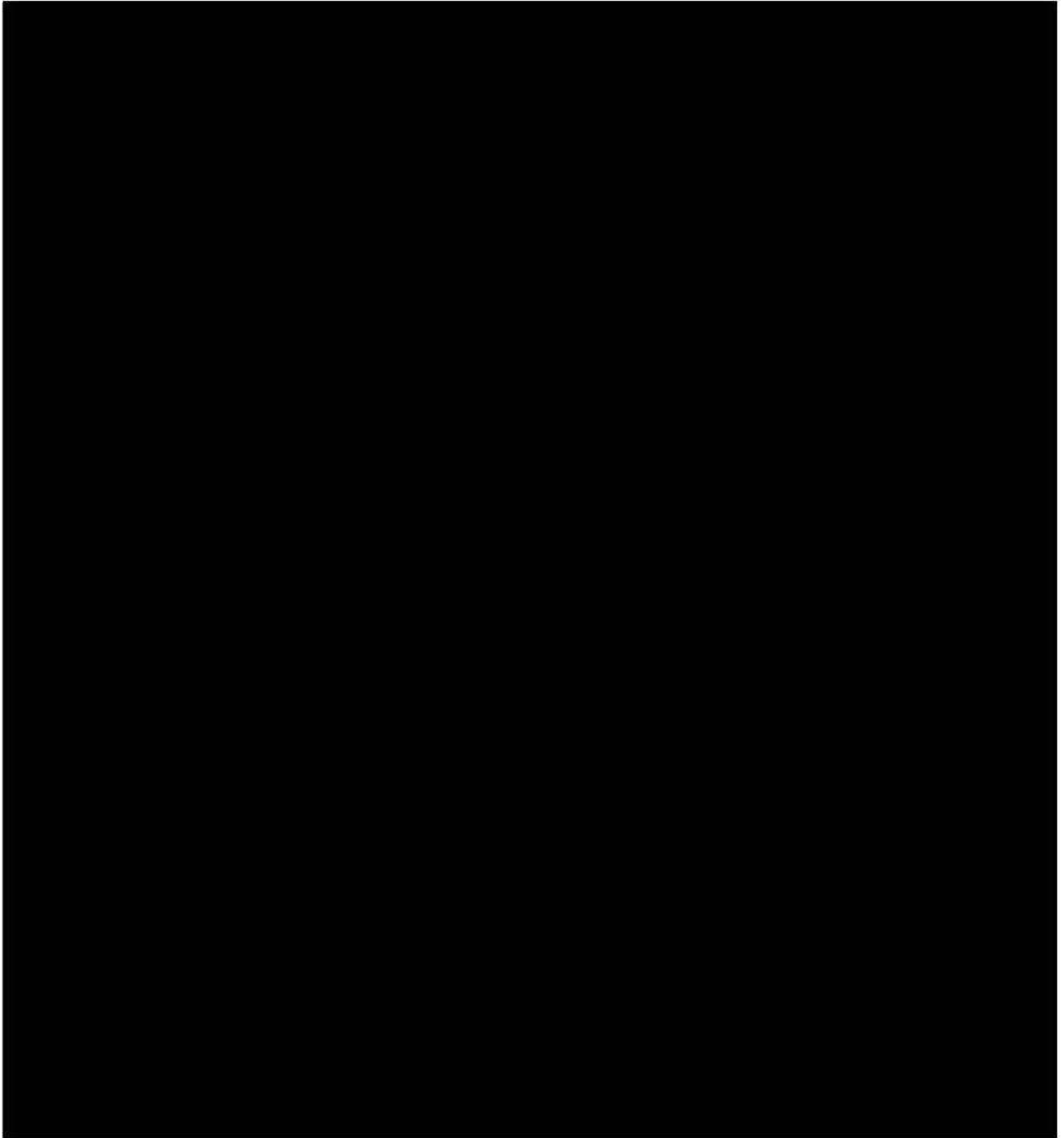
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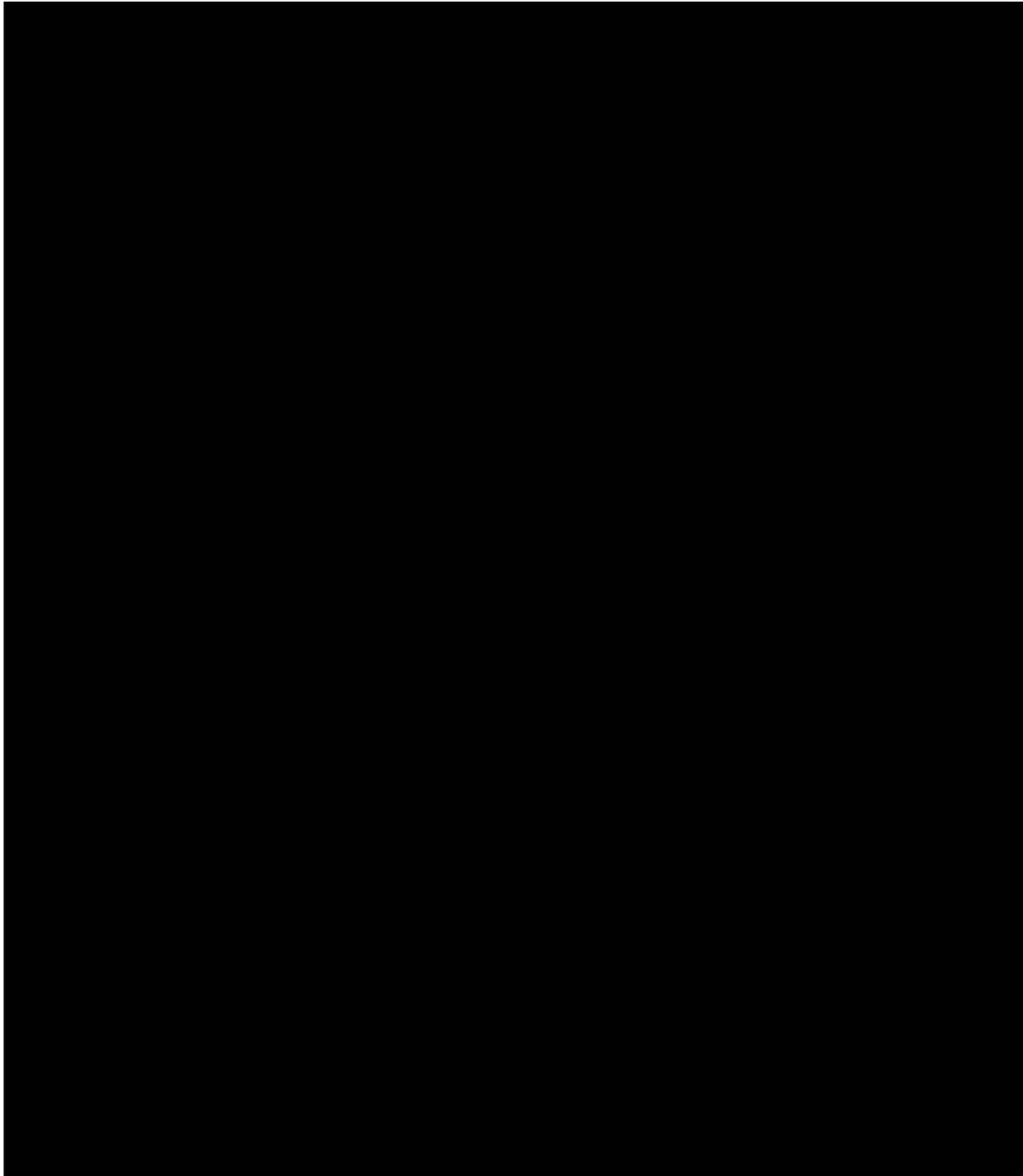
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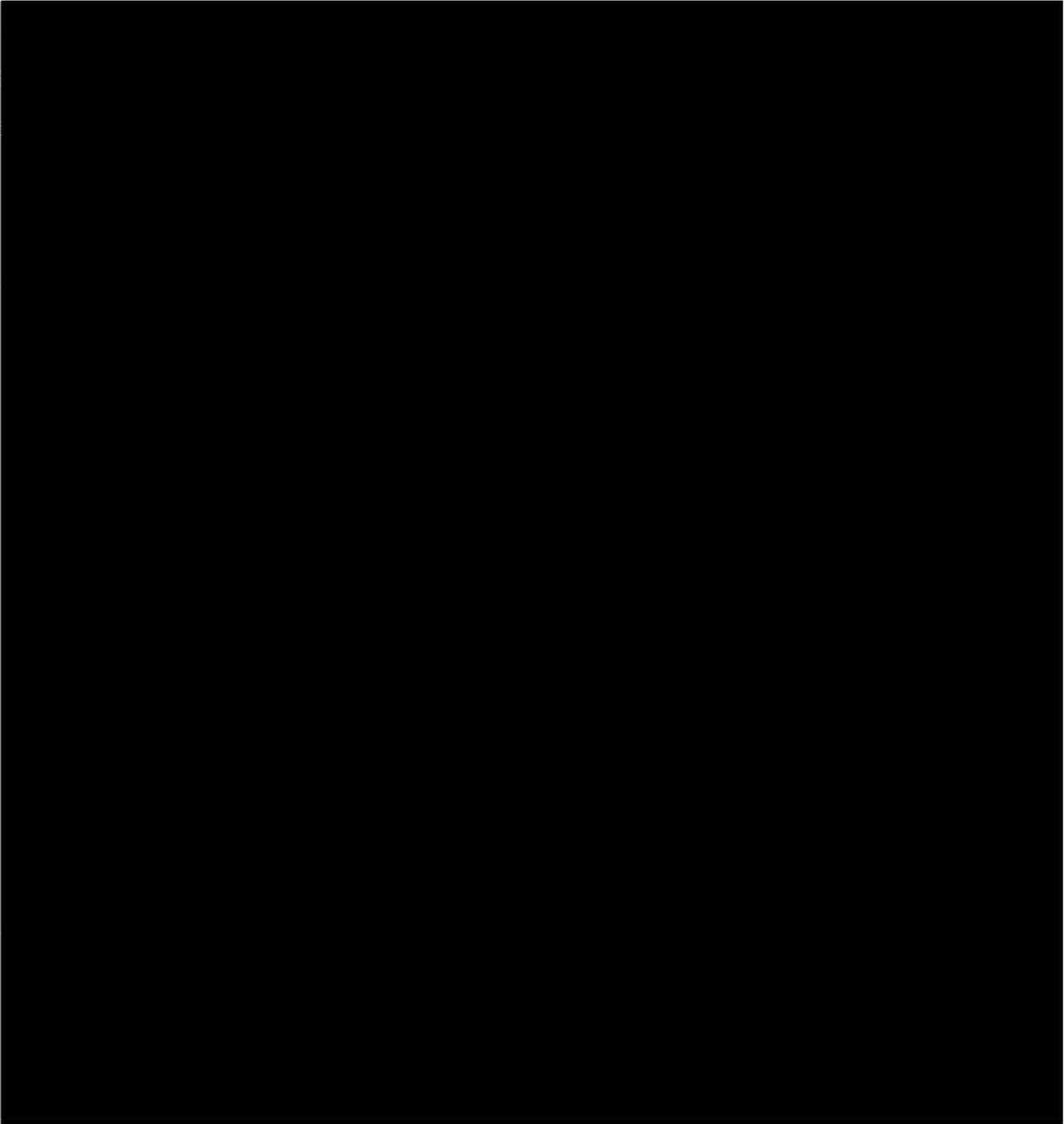
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1 A. Yes, sir.

2 Q. Okay. [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 A. We keep records based upon the duration of time they're in
6 there, based upon our DIMS entries. And then decisions upon anything
7 else like that is not managed by us.

8 Q. All right. Now, just to make sure we're tracking, if an
9 individual arrives here at 6:00 in the morning and then goes to court
10 at 9:00, he's only been in there three hours; is that correct?

11 A. That is correct.

12 Q. Okay. So you have records that show how long Cell Number 1
13 has been in use, Cell Number 2 has been in use. You have all those
14 records available?

15 A. I maintain the records in DIMS of when the detainees are
16 moved to and from the facilities.

17 Q. Well, but what records exist for the cell?

18 A. Like I said, I do not manage that, so I cannot tell you.

19 Q. Who does?

20 A. I don't know.

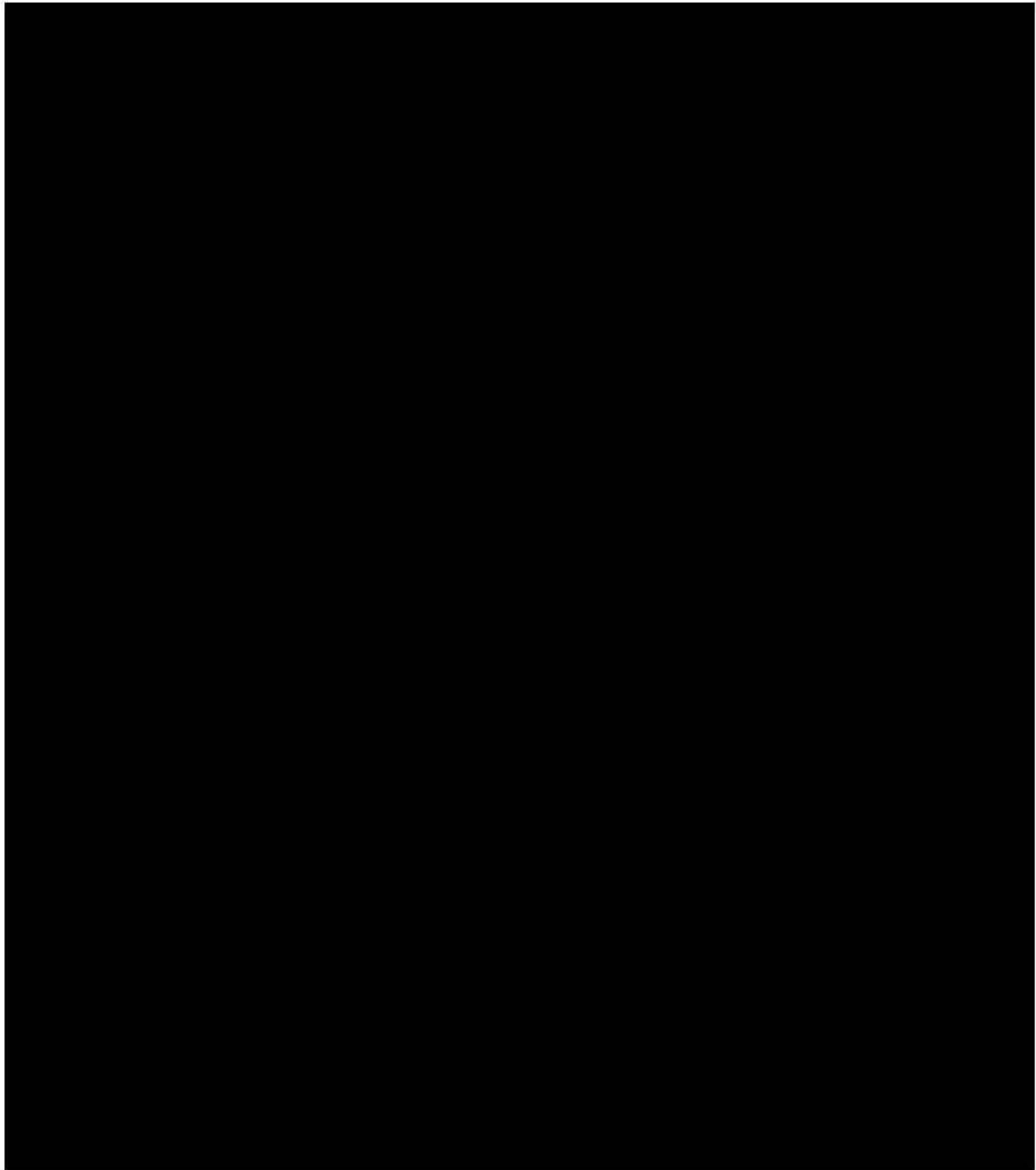
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1 Do you know what -- why a person is called an HVD?

2 A. I know they've been designated as an HVD.

3 Q. Do you know how they get that status?

4 A. Do not.

5 Q. Would it -- okay.

6

7 A. I have not.

8 Q. You're not familiar with that. Okay.

9 Now, when the H -- the CIA detainee is here, he's your
10 responsibility, correct?

11 A. There's no CIA detainee here that I'm tracking. I have my
12 detainees that I am maintaining security for.

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1 Q. [REDACTED]

2 A. Not completely, no.

3 LDC [MR. KAMMEN]: Okay. Thank you. I don't have anything
4 else.

5 MJ [Col SPATH]: Mr. Miller.

6 TC [MR. MILLER]: Just a couple. Thank you, Your Honor, for the
7 opportunity.

8 **RECROSS-EXAMINATION**

9 **Questions by the Trial Counsel [MR. MILLER]:**

10 Q. You indicated that you were comfortable with -- that most
11 of the visitors here -- that come here generally are not threats; is
12 that correct?

13 A. Yes, sir.

14 Q. But you do have to prepare, do you not, for the eventuality
15 that they are?

16 A. I absolutely do. And I also realize that we have a
17 significant population here that's also third-country nationals that
18 have certain clearances as well. I consider that as well, on the
19 island.

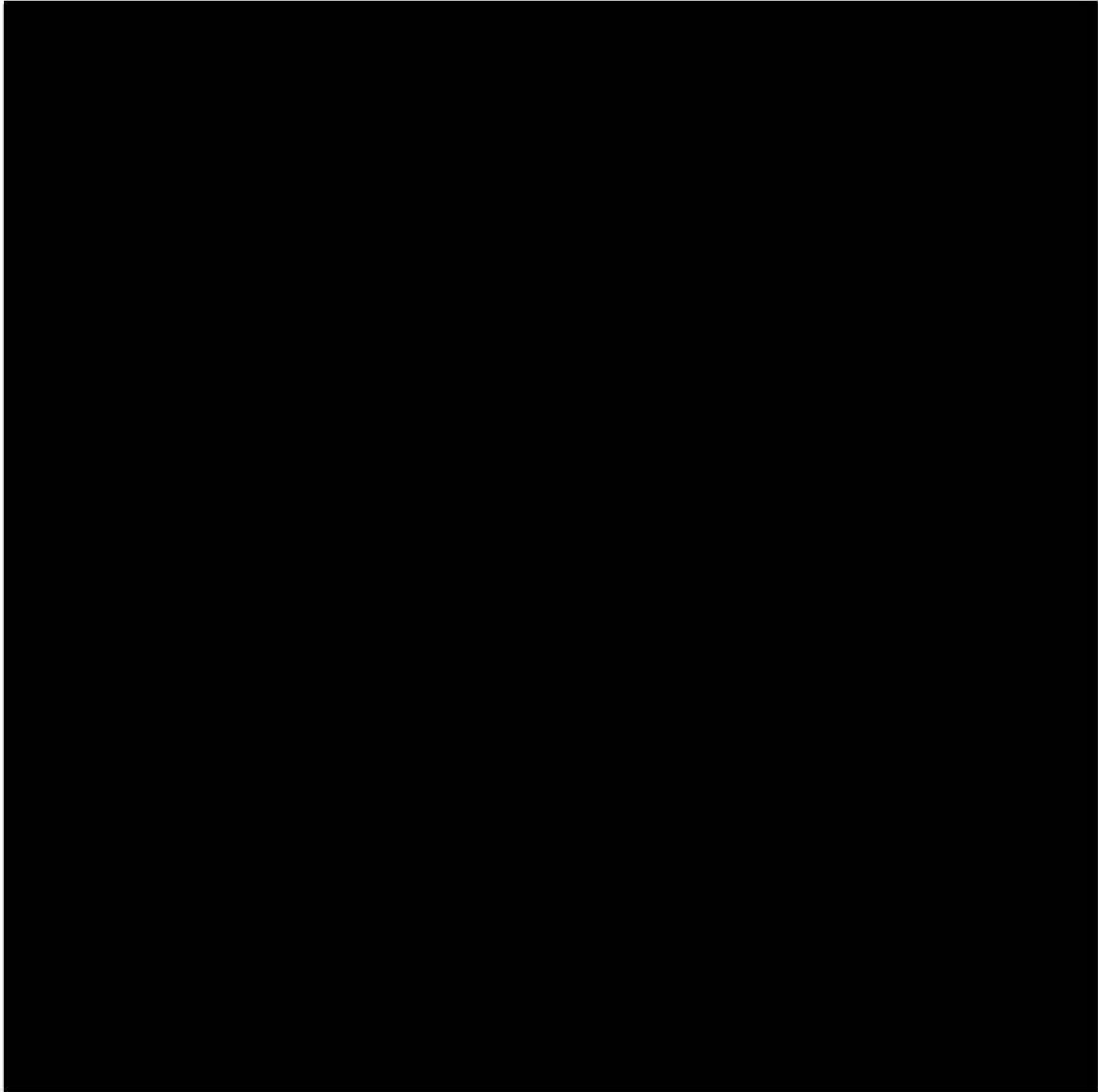
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1 A. Yes.

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22 TC [MR. MILLER]: All right. Thank you. Nothing further, Your

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1 Honor.

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REDIRECT EXAMINATION

3 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

4 Q. Did your SMO give you any kind of written report concerning
5 his conversation with Mr. Nashiri?

6 A. No, it was a verbal.

7 Q. It was verbal. And what day was this?

8 A. That we talked about this? It was last week.

9 Q. No, what day did he claim to have had this conversation
10 with Mr. al Nashiri?

11 A. Within the last two weeks.

12 Q. What day, specific?

13 A. I don't know. You would have to ask the SMO.

14 Q. Don't know, do you? Okay.

15 And how was it that the SMO came to be talking to
16 Mr. al Nashiri about this motion?

17 A. What they were talking about, I don't know. They were
18 talking something about medical. I don't get involved in their
19 discussions.

20 LDC [MR. KAMMEN]: Okay. I don't have anything else. Thank
21 you.

22 MJ [Col SPATH]: All right. And the same SMO will be here in

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1 March when we get here, correct?

2 Either microphone. Just make sure it's on.

3 TC [MR. MILLER]: Yes, Your Honor.

4 MJ [Col SPATH]: All right. I just want to make sure. Because
5 if that SMO departs, I have a feeling we'll be dealing with that
6 issue. So thank you.

7 **EXAMINATION BY THE MILITARY COMMISSION**

8 **Questions by the Military Judge [Col SPATH]:**

9 Q. Let me just ask Colonel Gabavics ----

10 A. Gabavics.

11 Q. Glad I can say it correctly.

12 I haven't been out to Camp VII. [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 A. [REDACTED]

17 Q. We've talked about a couple scenarios: How many people it
18 takes when the HVD is here, [REDACTED]

19 [REDACTED]
20 [REDACTED]

21 How many people are here -- because this is kind of the
22 in-between, right? We're in session, but we're in a closed session

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1 without the HVD here. So about how many of your people are involved
2 in this?

3 A. I did not see the report this morning. Based upon the fact
4 of the uncertainty we would have the HVD called here at any point
5 during time, [REDACTED] [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
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5 MJ [Col SPATH]: All right. I'll see -- I hopefully didn't, but
6 I'm going to see if the parties have any questions based on my
7 questions.

8 Defense Counsel, based on my questions?

9

REDIRECT EXAMINATION

10 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

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15 A. My -- I did not receive the report this morning because I
16 was not in the office before. So my only assumption would be,
17 generally speaking,

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8 LDC [MR. KAMMEN]: Okay. I've got nothing else.

9 MJ [Col SPATH]: All right.

10 Mr. Miller, any follow-up?

11 TC [MR. MILLER]: Nothing. Thank you, Your Honor.

12 LDC [MR. KAMMEN]: One omitted question.

13 MJ [Col SPATH]: All right. I'll give you another chance,
14 Mr. Miller, after this.

15 LDC [MR. KAMMEN]: Thank you. One question.

16 **REDIRECT EXAMINATION**

17 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

18 Q. I assume that Mr. al Nashiri's willingness or unwillingness
19 or his feelings two weeks ago versus his feelings now about staying
20 here or being returned to Camp VII had nothing -- had no impact on
21 your opinion; is that correct?

22 A. That's correct.

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1 LDC [MR. KAMMEN]: Thanks.

2 MJ [Col SPATH]: Mr. Miller, any follow-up?

3 TC [MR. MILLER]: Nothing further. Thank you, Your Honor.

4 MJ [Col SPATH]: All right. Colonel Gabavics, remember the

5 order I gave you the last time. It's going to be more time, because

6 this isn't going to get resolved quickly, but the focus is not to

7 talk about your testimony. So I'm not in any way affecting your

8 ability to talk to the SMO or be involved, of course, as the

9 commander of the joint forces as a group.

10 So do you understand the scope of my order?

11 WIT: I do.

12 MJ [Col SPATH]: I just don't want you to talk about what you

13 testified here with the attorneys until we resolve the issue. I

14 certainly do not want to impinge on you doing your job when you're

15 out of here. I know you understand that. Thank you. Thanks for

16 your testimony. You're excused.

17 TC [MR. MILLER]: Your Honor, before the witness leaves, is -- your

18 admonition also applied to him talking to the attorneys, or do you

19 not want him talking to the attorneys?

20 MJ [Col SPATH]: I do not mind at this point if he talks to the

21 attorneys, at all.

22 TC [MR. MILLER]: Thank you.

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1 MJ [Col SPATH]: Thanks.

2 TC [MR. MILLER]: Thank you for the clarification, Your Honor.

3 MJ [Col SPATH]: No, thanks for asking. I usually give them the
4 admonition and say they can talk to the attorneys. Yesterday I
5 didn't do that because I knew we would have breaks in the testimony,
6 and I didn't want any concerns, so -- all right.

7 **[The witness was warned, temporarily excused and withdrew from the**
8 **courtroom.]**

9 MJ [Col SPATH]: That motion as we work -- as we work through
10 Appellate Exhibit 359, or the 359 series, we're obviously not going
11 to resolve until March, as we talked about, and we will continue to
12 work through it. We'll have the SMO here in March and make some more
13 progress and hopefully get some closure.

14 For the documents you requested, yes, please, ask the
15 government. I'm not pre-ruling. I know you know me well enough.
16 And I don't know how I would rule. If there's a way to come to
17 compromise, I would come to compromise. It will then make it easy to
18 move forward into 359. If we can't come to compromise, that's okay.
19 I'll have a motion to compel, and maybe we can resolve that before we
20 get here.

21 So no direction, no thoughts. I just know that attorneys
22 really can work together and show each other things and make life a

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1 little easier for here. But we'll see how it goes. All right.

2 We've got 092 outstanding.

3 General Martins.

4 CP [BG MARTINS]: Your Honor, I have a housekeeping matter.

5 MJ [Col SPATH]: Sure.

6 CP [BG MARTINS]: Your Honor, I mentioned in the 505(h) a
7 declaration that I felt bore upon aspects of why we closed this that
8 I wanted to ----

9 MJ [Col SPATH]: This is for the 092?

10 CP [BG MARTINS]: No -- well, it can relate to the 092, but it
11 related to the SMO and why I stood up, and it relates to a lot of the
12 questioning you just had.

13 Mr. Kammen, I'll give you a chance to address this,
14 but ----

15 MJ [Col SPATH]: Well, I'll give him a chance.

16 CP [BG MARTINS]: I have -- Roger. Understood.

17 I have the declaration of Admiral Clarke that I referred to
18 in a 505(h). I would like the commission to actually have this as an
19 appellate exhibit, understanding they may object to you considering
20 it. We would like you to consider it.

21 The proceedings we've had, I believe, make it important.
22 It's an updated declaration in many ways to the Fraser declaration

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1 that we were looking at yesterday.

2 MJ [Col SPATH]: So it has not been attached to an appellate
3 exhibit at this point?

4 CP [BG MARTINS]: Not in this case. Not in this case.

5 MJ [Col SPATH]: I understand. So the Fraser declaration that
6 you directed me to ----

7 CP [BG MARTINS]: Correct.

8 MJ [Col SPATH]: ---- as part of Appellate Exhibit 014, this is
9 an update.

10 CP [BG MARTINS]: Your Honor, and I would defer to the
11 commission on how to ----

12 MJ [Col SPATH]: I'll get to how to mark it. I want to make
13 sure I understand you. This is an update to General Fraser's
14 affidavit in Appellate Exhibit 014.

15 CP [BG MARTINS]: It is. I think it bears, though, upon 059.
16 So that's why I'm doing this housekeeping matter here, and it bears
17 upon why you decided to close this testimony and so forth. So,
18 again, I think it's both relevant to the 014 series and your
19 protective order, and I think it's relevant to 359, understanding
20 they just -- they're just getting it. So I don't -- I just got a
21 copy of it myself and wanted to get it to you as quickly as I
22 could ----

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1 MJ [Col SPATH]: All right.

2 CP [BG MARTINS]: ---- in light of the Appellate Exhibit 014
3 considerations.

4 MJ [Col SPATH]: May I have a copy of it? We'll figure out what
5 to mark it. I'll talk to the court reporters.

6 CP [BG MARTINS]: May I approach?

7 MJ [Col SPATH]: You may. I'll talk to the court reporters, and
8 we'll figure out marking. Please. Thank you.

9 And I'm just getting this as well, and so in that regard I
10 haven't had a chance to look at it closely enough. Do you know what
11 date this was signed?

12 CP [BG MARTINS]: Your Honor, it doesn't bear a signature date.
13 The date of the filing was 29 January, so we submitted it on 29
14 January 2016 ----

15 MJ [Col SPATH]: In the other case.

16 CP [BG MARTINS]: ---- in the other case. It was attached there
17 to Appellate Exhibit 400C, which was a government response to press
18 movant's motion to unseal the 30 October 2015 transcript of public
19 proceedings. And that is the -- what stimulated the declaration from
20 Admiral Clarke.

21 So that aspect of it does not directly bear here, because
22 we haven't had a public release or a public transcript that so

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1 concerns an original classification authority. But I would submit a
2 number of paragraphs of this do provide a more immediate sense of the
3 equities that you see in Admiral Fraser's declaration, and I would
4 like to offer it.

5 MJ [Col SPATH]: But Rear Admiral Clarke was making the
6 declaration for -- specifically for issues associated with the other
7 case.

8 CP [BG MARTINS]: He was.

9 MJ [Col SPATH]: I just want to make sure ----

10 CP [BG MARTINS]: Absolutely. Absolutely.

11 MJ [Col SPATH]: Okay.

12 CP [BG MARTINS]: This is not a special declaration for the
13 Nashiri litigation, but it does deal with some of the same issues of
14 manning of the facility, and the "specific overall Camp VII
15 operations" is the phrase that he uses that I believe is what we were
16 getting close to ----

17 MJ [Col SPATH]: All right. I understand.

18 CP [BG MARTINS]: ---- the other day.

19 MJ [Col SPATH]: We'll probably, by e-mail, let you know what it
20 is marked and accepted into the record.

21 Hold on, Mr. Kammen. I gotcha. I owe you at least where
22 it is.

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1 CP [BG MARTINS]: Thank you.

2 MJ [Col SPATH]: It is probably going to be in the 359 series,
3 but I'm going to check with the court reporters, make life easy for
4 them and us. We'll let you know what letter to refer to it as we
5 move forward. All right.

6 Thank you, General Martins.

7 CP [BG MARTINS]: Thank you.

8 MJ [Col SPATH]: Mr. Kammen, not a lot to do with this yet. I
9 just have it.

10 LDC [MR. KAMMEN]: I understand.

11 MJ [Col SPATH]: I haven't read it, and it's not a declaration
12 for this particular case.

13 LDC [MR. KAMMEN]: And it would seem to me, if I understand the
14 procedures correctly that we're all supposed to be following, the
15 prosecutor should be filing a motion to supplement some file, and if
16 that were approved, then he could file this. And I thought that was
17 the rules we were operating under as opposed to us just standing and
18 saying, look at this. I'm happy to go with let's just look at this.

19 MJ [Col SPATH]: It is. Let me just say this -- and I agree
20 with you. In large part, that is certainly the process. I have
21 allowed both sides occasionally to provide me appellate exhibits in
22 the midst of this effort to try and get to the right answers.

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1 LDC [MR. KAMMEN]: I understand.

2 MJ [Col SPATH]: And so -- but that's why. It will just help me
3 read it.

4 LDC [MR. KAMMEN]: Here's my concern.

5 MJ [Col SPATH]: Tell me, please.

6 LDC [MR. KAMMEN]: Nobody's opposed to closing this part of the
7 hearing.

8 MJ [Col SPATH]: Concur.

9 LDC [MR. KAMMEN]: And so essentially he's saying here is more
10 justification for doing what we've already done.

11 MJ [Col SPATH]: It is. And yesterday I -- General Martins and
12 I have a fundamental disagreement on what caused the closure
13 yesterday.

14 LDC [MR. KAMMEN]: Well, and we could speak to that when we're
15 back on the record as opposed to in closed session.

16 MJ [Col SPATH]: Yes. That's right. We have a disagreement
17 there. It was an accidental question that didn't lead to a spill.
18 We can talk about it later.

19 LDC [MR. KAMMEN]: And just so we're ----

20 MJ [Col SPATH]: Or, no, it was a good question that didn't lead
21 to a spill.

22 LDC [MR. KAMMEN]: And when I reviewed his notes, his discussion

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1 was not about corpsmen. But that -- we'll visit that in March.

2 MJ [Col SPATH]: That's right. So ----

3 LDC [MR. KAMMEN]: But -- but here -- just a quick reading of
4 this. The Fraser declaration was germane because of the
5 classification of medical records.

6 MJ [Col SPATH]: Correct.

7 LDC [MR. KAMMEN]: A quick reading of this says nothing about
8 medical records. So I just -- I just don't see how it's -- I don't
9 care, because we don't care -- we agreed that this should be closed.
10 I just don't see the point of it, and that's part of the reason I
11 think that the procedures should be followed.

12 MJ [Col SPATH]: I understand. All right. More to come.

13 I'm going to hand this to the security officer so I don't
14 have it. All right.

15 So for 092, I think let me -- I have some questions for the
16 government. I heard that we may hear -- before we get to an
17 ex parte, I understand there's something about granularity, so I'm
18 going to try not to get to that point.

19 So Lieutenant Morris or General Martins, I don't know who's
20 going to -- do you want to say something, or do you want questions?
21 Or a question, frankly.

22 ATC [LT MORRIS]: I'm open to questions, Your Honor, towards

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1 getting -- as you said, towards resolution. I have prepared items
2 which may help Your Honor going forward.

3 And I think that reminding ourselves that we're at a place
4 where this commission has already approved a substitute, you know,
5 the rules are clear that in terms of the ability of the defense to
6 challenge that ruling that there's been a fair substitute -- I mean,
7 what we have here is a digital, you know, substitution.

8 MJ [Col SPATH]: I concur in -- almost with everything you said,
9 which is a judge prior to me has apparently -- and now that I have
10 read some more of it, I have yet to look at it -- approved a
11 substitute. Agreed.

12 The motion filing in 092, the core of the motion, is
13 destruction of evidence. So lots of hypotheticals you can take from
14 that. That particular motion might not be ripe, might be moot or
15 might be spot on, the motion itself. Not the resolution. I think
16 you know what I am saying, the resolution of the motion. So 092
17 might be resolvable. It likely just will lead to other motion
18 filings.

19 That's my question, is: Given that a request was made to
20 
21 we talked about it yesterday -- Mr. Kammen clearly has been advised
22 of that somehow, through you all. Today, has that occurred? It's a

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1 yes or no. I do not need any more granularity than that.

2 I mean, the request from the government was we want to do
3 away with it. We're going to destroy it. And apparently there was
4 an agreement and an ex parte filing that there would be a substitute
5 of a video that I am going to look at. I'm going to look at the
6 ex parte filing -- ex parte filing. That way, when I look at what
7 was given to you, I can do the comparison as well. I think it's
8 important to make sure the two of them are the same.

9 I mean, that's it. Because if it has been, 092 is the
10 right motion; if it hasn't been, 092 is moot. And then there will be
11 other motion practice.

12 ATC [LT MORRIS]: May I, Your Honor, provide you granularity
13 within -- I know you asked for a yes-or-no answer, and following ----

14 MJ [Col SPATH]: I'm not asking -- yeah, I don't have any
15 follow-on questions. Because the motion is just: Has the evidence
16 been -- I mean, the motion is destruction of evidence.

17 ATC [LT MORRIS]: Let me provide Your Honor the following, and I
18 think this will be more helpful than that, and even more fulsome.
19 But these are good -- this is good fencing for me in terms of what I
20 can provide here.

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You know, you can -- and as Your Honor will see, using this

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MJ [Col SPATH]: And I think we're saying the same thing at
least in -- it's hard to get yeses and noes from lawyers. This one
seems, I think, closer.

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Is that -- not rephrasing. Is that saying back to you what
you said to me?

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ATC [LT MORRIS]: Yes, Your Honor.

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MJ [Col SPATH]: All right. What I imagine is going to happen

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1 is different motion filings from the defense. And that's not --
2 again, no suggestion about rulings or future practice or what we'll
3 do. [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 But what you're telling me is, well, the structure is there
7 and relevant material or relevant items inside, as referenced in the
8 substitution, still exist, at least right now. Is that fair?

9 ATC [LT MORRIS]: Correct, Your Honor.

10 MJ [Col SPATH]: Okay. Let me talk with Mr. Kammen for a
11 moment. And I appreciate that granularity. That helped. Thank you.

12 So, Mr. Kammen?

13 LDC [MR. KAMMEN]: Who goes first, you or me?

14 MJ [Col SPATH]: Well, let me ask. Here's my question to you:
15 I don't know what motions you might file in response to that. I have
16 some guesses, because they've been filed in the past, or preservation
17 motions, request a visit.

18 LDC [MR. KAMMEN]: The most -- look, the most important thing,
19 given the history of this, is that you today -- and you have the
20 authority today to enter an order directing that the status quo be
21 preserved.

22 We will file additional motions, absolutely, based upon

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1 this representation. But I don't want it to become a race between us
2 where we can't get into court for another three -- two and a half
3 months, and the people who want to destroy it.

4 And so I think it is fair, given the representations, that
5 you enter an order today telling the prosecution, [REDACTED]

6 [REDACTED]
7 [REDACTED] You

8 can't go back to yesterday, but we don't want to come in here in
9 March and, you know, have the prosecutor say, well, today it's all
10 been destroyed.

11 So that's -- once -- if you will do that to preserve your
12 jurisdiction and authority ----

13 MJ [Col SPATH]: Because that does change, at least at the
14 moment, unless tomorrow it's destroyed. But, I mean, today that
15 changes where we were.

16 LDC [MR. KAMMEN]: Yes, absolutely. But that's why we -- you
17 know, we can't go through this, the whole we file it 14 days ----

18 MJ [Col SPATH]: I understand. That, I understand. I'm going
19 to talk to the government about that.

20 LDC [MR. KAMMEN]: If you do that, then we know how to proceed,
21 and we'll proceed -- it will be secret. We're not going -- you know,
22 it's all of that.

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1 But we just want to preserve -- we don't want to have this
2 happen again, you know. And maybe -- look, I mean, you know, we all
3 hear different things. This may be what Mr. Morris was saying, and
4 maybe it wasn't. But this may all be solvable with a trip.

5 We may be able to go there, look at what -- you know, and
6 their position may be, look, six men and a wild monkey are not going
7 to get you into this place. Fine. That's what we have you for.

8 MJ [Col SPATH]: That's right. At least then we can have
9 the ----

10 LDC [MR. KAMMEN]: Right.

11 MJ [Col SPATH]: ---- intellectual discussion about the right
12 answer.

13 LDC [MR. KAMMEN]: Right. But we've got to have the order
14 preserving it, and it's got to be today. That's really critical.
15 Otherwise, we're going to get here in March and you'll ask the
16 prosecutor who is there then, and I guarantee you the answer will be
17 different.

18 MJ [Col SPATH]: Or I'll be receiving an ex parte filing and
19 we'll be having the same discussions.

20 LDC [MR. KAMMEN]: Well, yeah ----

21 MJ [Col SPATH]: I'd like to avoid some of that, if we can.

22 LDC [MR. KAMMEN]: Right. But ----

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1 MJ [Col SPATH]: I want to stay out of that, if I can. I don't
2 know if I can. Hoping to stay out of it.

3 LDC [MR. KAMMEN]: Well, I understand. It seems to me -- I
4 understand all the national security stuff and all of that. But it
5 does seem to me, Your Honor, that once a matter is before the
6 commission in open court and [REDACTED]

7 [REDACTED] I mean, you
8 know, there comes a point when the ex parte process becomes so
9 abusive that it's the responsibility of the commission to curtail it.

10 But right now all we just need is an order telling --
11 making sure the government of the United States preserves this
12 evidence, in whatever form it is now, so that we can have this fight
13 in a reasonable way later on. And we can work through it, and we can
14 work through it in a way that is -- and, you know, obviously preserve
15 it, keep it as it is, no further modifications. Preserve it as it is
16 today, December -- 11th?

17 MJ [Col SPATH]: 16th.

18 LDC [MR. KAMMEN]: 16th. December 16th, 2016. Do that, we're
19 done for the moment. Thank you.

20 MJ [Col SPATH]: Lieutenant Morris.

21 ATC [LT MORRIS]: Your Honor, I don't think Mr. Kammen is being
22 glib when he says I understand this national security stuff, but, to

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1 be quite frank, he has a responsibility to zealously represent his
2 client. We have responsibilities in regards to national security as
3 the prosecutors, and those are different.

4 MJ [Col SPATH]: Absolutely.

5 ATC [LT MORRIS]: For Mr. Kammen's specific request, we oppose
6 it. And we oppose it for the reasons that we will then have to
7 explain to Your Honor in an ex parte presentation and for the same
8 reasons, Your Honor, that we provided in our ex parte presentation in
9 the summer of 2012, Your Honor -- or an ex parte filing is what I
10 mean, Your Honor.

11 MJ [Col SPATH]: It is -- that one, I'm struggling just because
12 of the time between '12 and now, with -- not with the lack of
13 [REDACTED] That doesn't bother me. It's just that
14 the ration -- we probably need to have that discussion, and maybe we
15 will.

16 Let me ask this -- and if we can't, I get it. Maybe this
17 gets to the granularity you don't want to discuss. I'm just looking
18 for a brief window where I can -- so maybe you all know this, and
19 maybe you don't. And, again, I don't need to know what's happening,
20 who's doing what, or anything like that.

21 Are there likely to be modifications or changes in the
22 short term? Define "short term" as -- we have the Christmas holiday

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1 here -- over the next 30 days.

2 ATC [LT MORRIS]: Your Honor, we will explain this in an
3 ex parte presentation.

4 MJ [Col SPATH]: Okay. I understand. I recognize many issues.
5 One is there has been a substitution proposed. The defense argument
6 to that, of course, is the judge approved the substitution without
7 seeing the evidence that he was substituting it for. Whereas in the
8 120 series of filings, right, I see the stuff. I see the proposed
9 substitution. And I see what it will look like when it reaches the
10 defense. And so I have the original.

11 And so I just -- again, these aren't rulings, these are
12 issues that I think you would see with CIPA. You would -- I get it.
13 It's just there's going to be the argument of to approve a
14 substitute. And I don't use a capital case as a solve-it-all every
15 time, General Martins. I promise you. I use it as the United States
16 Government in the commissions process gave heightened protections for
17 capital defendants. That's their choice. And part of those were, to
18 the extent necessary, the protections they'd have in a federal court
19 to include, you know, the mitigation case, which this seems to relate
20 to.

21 So that's what I am trying to wrap my brain around, is you
22 understand the risk that is upon you if ultimately there's an issue

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1 with the substitution or I find -- because I haven't ruled yet --
2 that a responsible judge would have viewed the original -- and this
3 is not -- I'm not commenting on it.

4 When I say this, I'm not saying I don't agree with Judge
5 Pohl or do agree -- would have gone and looked at it, but maybe did
6 through photos or something like that. There's -- you know, there's
7 lots of ways that can happen before approving a substitution. Maybe
8 Judge Pohl did just that, right? And, again, I haven't talked to him
9 about it, so -- and I'm not going to. If I talk to him about it, it
10 will be here as a witness, I think.

11 So what I'm -- you understand what I am trying to ask here
12 or what I am trying to do, is there is some litigation risk on the
13 government.

14 ATC [LT MORRIS]: Your Honor is not stepping out into uncharted
15 territory. I mean, you have your predecessor that has ruled on
16 this ----

17 MJ [Col SPATH]: He did.

18 ATC [LT MORRIS]: ---- but in addition to that ----

19 MJ [Col SPATH]: He approved the -- that's right. He approved
20 the substitute.

21 ATC [LT MORRIS]: But in addition to that, I mean, that is just
22 historical. But beyond this, I mean, we would point Your Honor

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1 towards the Moussaoui case that dealt with a similar issue here. We
2 have a capital case. We have a federal court utilizing CIPA in which
3 they reached a resolution without actually interviewing the actual
4 witnesses. We also have Judge Sullivan who, with this exact same set
5 of facts, approved an exact same substitute.

6 In addition, we would just submit to Your Honor and impress
7 upon you to view the video and digital substitution, and what you'll
8 see there ----

9 MJ [Col SPATH]: Absolutely, I'm going to do that. Again, I'm
10 going to view the government's ex parte filing, and then once we fix
11 the technology fix, although I believe likely they're going to be
12 exactly the same, I owe it to Mr. Kammen to look at what was shown to
13 Judge Pohl and what was given to Mr. Kammen to, at the very least,
14 make sure they're the same; or if they're different, talk about it.
15 So I promise you and I assure you I'm going to look at those.

16 What I hear is we're at a place that you need an ex parte
17 submission. Is it something that we can do here with the court
18 reporters on the record now, or is it something you want to submit a
19 filing on?

20 ATC [LT MORRIS]: May I have just a moment, Your Honor?

21 MJ [Col SPATH]: You may.

22 **[Pause.]**

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1 ATC [LT MORRIS]: I think we could use our time, you know, that
2 we're all here now, to have some of that conversation. Obviously we
3 would like to -- we have the option to sup -- or to come to Your
4 Honor in a filing as well. But we would like to try and avail
5 ourselves of the opportunity now.

6 MJ [Col SPATH]: All right. I understand.

7 Separate issue. The classified filing, General Martins,
8 the affidavit I have, it has some highlights on it. I don't ----

9 CP [BG MARTINS]: Perhaps I gave you the wrong one.

10 MJ [Col SPATH]: Not a worry. I just -- the one that goes in
11 the record needs to be clean, and I want a clean one before I get it.
12 I didn't even notice the highlights. My security officer noticed the
13 highlights.

14 Perfect. I'm going to trade you, General Martins. Thank
15 you. Here you go.

16 And, again, we'll sort through it. If we're going to have
17 a filing on this exhibit, Mr. Kammen, you'll see the request for
18 filing, and then you can make a motion to supplement. If we're going
19 to accept it, you'll see an appellate exhibit number, and we'll move
20 forward.

21 We made the process cumbersome with the motions to
22 supplement and file, and that -- again, I can wish it were different

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1 ways. But we have -- I've allowed both sides to take advantage of
2 that opportunity when we're here live because it helps me get to
3 resolution, even if ultimately the information given to me isn't
4 helpful. I can discard it very quickly and move to the relevant
5 pieces of this.

6 Mr. Kammen, I appreciate what you have said about 092. The
7 only thing I can tell you is -- a few things: If I'm going to issue
8 an order without briefings, you'll see it; if I'm not, you won't,
9 obviously, and you'll know that.

10 If I'm going to issue -- if I'm not -- if I'm going to
11 affirm a destruction order, it will be delivered to you. It's not
12 going to be done without notification. Again, that doesn't change
13 it. What happened last time for whatever reason where it didn't get
14 to the other side, we want to avoid.

15 And so ultimately if I concur and I say it's going to be
16 destroyed or can be destroyed, notice will come to you.

17 LDC [MR. KAMMEN]: Okay.

18 MJ [Col SPATH]: And I recognize that -- and, again, I'm not
19 ruling. I don't know because I haven't heard the ex parte
20 presentation and I don't understand the scope of the playing field,
21 and I want to. And then we'll kind of go from there.

22 So I believe you've made the record and certainly put

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1 yourself in a position that was different than yesterday.

2 LDC [MR. KAMMEN]: The one thing I really want to stress, and --
3 is that we're dealing with an agency that is not entitled to a
4 presumption of good faith. And I don't think that can be overstated.

5 They have -- the CIA has lied to court after court after
6 court after court, 9/11 Commission, Congress. These -- you know,
7 they have an agenda, and they have -- they are not entitled to a
8 presumption of good faith.

9 Part of our concern is you have an exhibit that they -- the
10 CIA essentially tells you this is the place. There is no independent
11 verification that what you have is actually the place. And frankly,
12 Your Honor, [REDACTED]
13 any more credibility than any other thing, given the history.

14 At a minimum, the government should have provided something
15 from someone -- something contemporaneous from someone who was there
16 who affirms this is the place and this is how it looked when they
17 were torturing people there. And in the absence of that, I don't see
18 how -- you know, I mean, I think there is this fundamental problem.
19 And then when you say -- you know, you listen to them and may allow
20 the destruction, I think that further compounds the problem.

21 And that's why -- and, you know, if we can stop this
22 process, you know -- yeah, there's -- you can argue about

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1 litigation -- you can counsel them about litigation risks, but I'm
2 not going to be naive here. You know, the litigation risk is on us,
3 because, [REDACTED] they're going to have somebody say, yeah,
4 it's all good. And, you know, our fear is you'll give them the
5 benefit of the doubt or, you know, wow, it's only one place and, you
6 know, everyone admits he was tortured, so there's really no harm
7 here.

8 Well, this is an opportunity to avoid all of that and to
9 rescue victory from the jaws of defeat for the system. And it's
10 troubling to me that even in light of all of this and all the
11 history, [REDACTED] you
12 know. And, you know, I think we're going to have this argument over
13 and over again.

14 At some point the government, writ large, of the
15 United States has to make a decision. Do they want to kill Nashiri
16 or, you know, do they want to do something else? Because, you know,
17 he'd be facing a life sentence and we'd have -- life would be a lot
18 simpler. But if they decide they -- if they persist in wanting to
19 kill him, then, you know, you -- the litigation risk can't always be
20 on us, and that's the way this is playing out.

21 And so, you know, again, we're powerless here. We -- you
22 know, you're going to do what you're going to do, but we do ask you

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1 to consider the problems and the history and everything else, and the
2 fact that if it's waited four years, it can wait another six months.

3 Thank you.

4 MJ [Col SPATH]: Thank you. All right.

5 I believe that closes what we can talk about in this 806
6 hearing. I gave you a preview about March, more to come. We'll get
7 a new order out.

8 If you all can stay behind, we'll clear the room and we'll
9 enter into an ex parte proceeding very quickly.

10 For the defense, thank you. I'll see you ----

11 LDC [MR. KAMMEN]: See you at the plane.

12 MJ [Col SPATH]: ---- in March or on the plane.

13 So the 806 is adjourned. Thanks.

14 **[The R.M.C. 806 session recessed at 1218, 16 December 2016.]**

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